

*Pandora's Box*  
*2002*



A Publication of the Women and the Law Society  
UNIVERSITY OF QUEENSLAND



# *Pandora's Box 2002*



Editors

*Katarina Konkoly*

*Zara Spencer*

*Tiffany Stephenson*

# Editorial



This year we celebrate the tenth anniversary of the *Women and the Law Society* and share our celebrations with the centenary for suffrage. The 12<sup>th</sup> of June 1902 marked Australia as the first country to permit women to both stand for parliament and vote. This moment of recognition has served to provide Australian women with the legislative means with which to strive for gender equality. Embarrassingly, over half a century was to pass before Indigenous women were afforded the same rights.

Whilst reaching out to the future of WATL, Pandora's Box remains confident in its past. WATL was formed to address gender issues within the T.C. Beirne Law School, legal profession and the wider community; and to link law students with established networks for female legal professionals. In continuance of WATL's aims for the promotion of gender and social justice, Pandora's Box 2002 has aimed to continue and further the projection of social justice to the global arena. This edition has welcomed alternative forms of expression namely poetry and reviews as well as featuring contributions that profess an expansive range of perspectives on women's relationships with the law, dovetailing general themes of emerging norms of human rights law in addition to touching on environmental concerns.

We would like to extend our gratitude to Spinifex Press who so graciously provided us with the books, to review; and this is a relationship that should be strengthened and continued into the future.

We would finally like to invite you to challenge and reflect upon the eclectic and multifaceted material Pandora's Box 2002 has provided.

Katarina Konkoly                      Zara Spencer  
Editors, *Pandora's Box* 2002.

Tiffany Stephenson

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# Foreword



**Zenovia Pappas \***

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\* Ms Zenovia Pappas was the President of WATL in 2001, and is currently the associate to Justice Debra Mullins of the Supreme Court of Queensland.

*“You must be the change you wish to see in the world”*

- Mahatma Gandhi

I recall that in my second year of law a male student once asked me why we still needed an organisation like the Women and the Law Society (WATL) when the world for women had changed so much and women had attained equality. I just replied, “It’s because of comments like that!” Equality is not something that is attained, it is simply something that is - something that exists and needs only recognition, but the recognition can only come through the eyes of compassion and decency. And change is not a periodic phenomenon; it is a continuous cycle. Yes, the world for women has changed, but there is still a great deal of work to do.

WATL strives to change the world by opening up the world to the consciousnesses of those around it through its activities, publications and campaigns. Educating others in particular is an important facet of WATL’s aims and *Pandora’s Box* is just one fine example of this! Within the pages of the 2002 edition of *Pandora’s Box* you will again find a diverse range of literature dealing with issues that will no doubt enlighten. Congratulations to WATL for such a splendid publication!

WATL is wonderful society full of enthusiastic and dedicated members. It is a pleasure to be a part of, and I hope it remains part of our lives indefinitely.

Enjoy the reading!

Zenovia Amerisa Pappas



# A Gendered Interpretation *Women on the Bench of the International Criminal Court*



**Katie Sutton\* & Jayne Huckerby\***

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**Joint Women's Campaign Co-ordinators, Amnesty International NSW Legal Network.**

Who interprets the law is at least as important as who makes the law, if not more so.... I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.<sup>1</sup>

## Introduction

On July 1 2002, the Rome Statute of the International Criminal Court (the Rome Statute) came into force, establishing the International Criminal Court (ICC) as the first permanent international tribunal to try individuals for genocide, war crimes and crimes against humanity. In particular, by codifying rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence as war crimes and crimes against humanity,<sup>2</sup> the ICC legislative framework has increased the scope of sexual violence and gender-based crimes occurring during armed conflict that can be subject to prosecution. The inaugural inclusion of gender-based persecution as a crime against humanity and the fact that trafficking is encompassed within enslavement as a crime against humanity, also constitute greater attention to the situation of women in armed conflict situations.<sup>3</sup>

These definitional changes represent significant attempts to address the previous international legislative vacuum. However, ultimately the utility of these provisions will depend on the effectiveness of the conditions that structure their implementation. The two most critical of these conditions being the rules of evidence and procedure, and the approach and expertise of judicial and support staff. This paper focuses on the latter, and particularly on the issue of the composition of the judiciary.

The first section of this paper addresses the ways in which the qualities of judges articulated in the Rome Statute are directed towards minimising gender bias and ensuring gender sensitivity. The second section outlines the nomination and election procedures for judges, highlighting the

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<sup>1</sup> Judge Pillay, female judge on the International Criminal Tribunal for Rwanda (ICTR). Cited in Barbara Bedont and Katherine Hall Martinez "Ending Impunity for Gender Crimes under the International Criminal Court" *The Brown Journal of World Affairs*, VI(1) (1999) at 65-85. Available at < [http://www.crlp.org/pub\\_art\\_icc.html](http://www.crlp.org/pub_art_icc.html) >

<sup>2</sup> The Rome Statute of the International Criminal Court, Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g)

<sup>3</sup> The Rome Statute, Articles 7(1)(h), 7(1)(c) and 7(2)(c).

predominance of nomination procedures at the national level and identifying changes that need to take place to ensure the qualities of judges outlined in the first part of the statute are realised. Finally, this paper approaches the broad issue of why it is important to have female judges on the bench, whilst simultaneously warning against an approach that sees gender as a universal experience that uniformly guides judicial pronouncements.

## **Nomination and Election of Judges**

### Qualities of Judges: Increasing Gender Sensitivity

Part 4 of the Rome Statute governs the composition and administration of the Court, which has three main bodies: the Office of the Prosecutor, the Registry, and the Judiciary (subdivided into Pre-Trial, Trial and Appeals Chambers). There are several structural mechanisms in place to provide the foundation for a gender sensitive judiciary. First, Article 36 (8)(a)(iii) provides that a “fair representation of female and male judges” be taken into account in the selection process. This requirement extends to the selection to the Office of Prosecutor and all other organs of the Court.<sup>4</sup> Secondly, the statute mandates that state parties consider the need for legal expertise on violence against women and children as a further selection criterion.<sup>5</sup>

In addition to these provisions regarding the appointment and nomination of judges, other provisions may facilitate a gender sensitive approach by all organs of the Court. For example, there is a concrete obligation on the Prosecutor to appoint advisers with legal expertise on specific issues, including sexual and gender violence and violence against children.<sup>6</sup> The Statute also provides for the creation of a Victim and Witness Unit within the ICC's Registry to “provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims... and others who are at risk on account of [their] testimony.” The unit must include staff with expertise in trauma, including trauma related to crimes of sexual violence.<sup>7</sup>

However the extent to which these provisions will secure substantive representation of women and their concerns remains to be tested. On one level these provisions are progressive because they represent the first time that a treaty forming an international body explicitly has incorporated female representation and gender expertise as factors in the selection process of judges.<sup>8</sup> However, the effectiveness of these provisions may be compromised by the fact that their final form reflects a retreat from their more stringent expression in the earlier draft of the March 1998 Preparatory Committee. Specifically, the term “gender balance” was replaced with the more nebulous phrase “fair representation of men and women,” and “expertise on issues related to sexual and gender violence, violence against children and other matters” was replaced with the more narrow “legal expertise on specific issues, including, but not limited to, violence against women or children.”<sup>9</sup> How these provisions play out will ultimately depend upon the intricacies of the national appointment process and procedures governing the subsequent selection by the Assembly of States Parties.

### Procedural Mechanisms

The Rome Statute provides that the Assembly of States Parties will elect by secret ballot eighteen judges<sup>10</sup> from a pool of nominated candidates, on the basis of equitable geographical

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<sup>4</sup> The Rome Statute, Article 44(2)

<sup>5</sup> The Rome Statute, Article 36 (8)(b)

<sup>6</sup> The Rome Statute, Article 42 (9)

<sup>7</sup> The Rome Statute, Article 43(6) and Article 68

<sup>8</sup> Barbara Bedont and Katherine Hall Martinez above n2.

<sup>9</sup> For a general discussion of the debate surrounding these terms see above.

<sup>10</sup> The Rome Statute, Article 36(1)



representation, representation of the principal legal systems of the world and fair representation of male and female judges.<sup>11</sup> Each State Party nominates one candidate<sup>12</sup> using either the procedure for appointment to the highest judicial offices in the State in question or the procedure for nomination of candidates for the International Court of Justice in the Statute of that Court. This latter procedure involves the national group (typically made up of four people, usually with legal backgrounds) presenting a list of potential candidates from which the executive then chooses.

The rules of procedure which will govern the subsequent election of judges by the Assembly of States Parties have not yet been finalised. However, at the Preparatory Commission for the International Criminal Court held on 1-12 July 2002, the Working Group on the Assembly of States Parties produced a Draft resolution on the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court.<sup>13</sup> From the perspective of facilitating a gender-sensitive Court, the most pertinent draft provision is that which provides that in the first election of judges, the Assembly of States Parties shall extend the nomination period if there are less than 9 candidates from each gender.<sup>14</sup> This provision may actually be problematic, because while the idea of “fair representation” imports a notion of proportionality, the minimum is expressed as an absolute figure. Moreover, the obligation currently only exists in relation to the first election of judges.

However, these criticisms may be hollow, given that ultimately the rules of procedure to be finalised by the Assembly of States Parties are limited in the extent to which they can structure the pool of candidates with whom they are presented. Essentially it is the national appointment process that will feature prominently in the determination of who will preside at the Court. The extent to which this includes females will very much depend on the elimination of practices which currently discriminate against the nomination of women in national processes, such as the lack of transparency in nomination processes and the subsequent lack of awareness of the posts among relevant women’s associations; the involvement of only very few high state officials and absence of public consultation in the process; and the practice of “vote trading” agreements between states to exchange their votes for (invariably male) candidates running for posts in other international institutions. The fact that Australia has only had one woman Justice on our highest court, Justice Mary Gaudron, and that our only other judicial representatives on international bodies are men (David Anthony Hunt on the International Criminal Tribunal of the Former Yugoslavia (ICTY) and ICTR, and John S. Lockhart on the World Trade Organisation Appellate Body) means that Australia must particularly seek to examine our national appointment procedures to ensure a representative candidature. Moreover, in order to achieve a fair representation of women, the national nomination processes and subsequent elections, need to be informed by a strong sense of why it is so important to secure the appointment of female judges.

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<sup>11</sup> The Rome Statute, Article 36 (8) (a)(i)(ii)(iii)

<sup>12</sup> The Rome Statute, Article 36(4)(b)

<sup>13</sup> Working Group on the Assembly of States Parties, *Draft resolution on the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court* PCNICC/2002/WGASP-PD/L.6 and *Draft resolution on the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court* PCNICC/2002/WGASP-PD/L.6/Corr.1

<sup>14</sup> Working Group on the Assembly of States Parties, *Draft resolution on the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court* PCNICC/2002/WGASP-PD/L.6/Corr.1

## Why Women? A Qualified Recognition of the Importance of Female Judges

There are a number of reasons why it is critical to have women on the bench. The first is that fair representation of male and female judges is inadequately addressed in international and regional judicial institutions.<sup>15</sup> The paucity of women in these institutions is starkly demonstrated by the fact that only 31 of the 218 judges and members that comprise the major international and regional institutions are women.<sup>16</sup> Further, only one woman (current member Rosalyn Higgins) has ever served as a judge on the 15-member International Court of Justice. In terms of international criminal tribunals, there is presently only one woman serving as a permanent judge out of sixteen panel members of the International Criminal Tribunal for the Former Yugoslavia.<sup>17</sup> The representation on the International Criminal Tribunal for Rwanda is only marginally better, with three women judges out of the current sixteen member panel.<sup>18</sup>

Secondly, in the context of Australia's legal system, it has been recognised that one of the arguments for the appointment of more female judges is that public confidence in the judiciary is only maintained if that judiciary is seen to reflect the composition of society.<sup>19</sup> This argument becomes more potent in the context of the judicial make-up of the International Criminal Court, which as a new body dealing with politically charged environments, will need to stake its claim to credibility, impartiality and representativeness if it is to be successful.

In the past, public confidence in the judiciary has particularly been shaken by awareness of the legal treatment of violence against women.<sup>20</sup> The unprecedented codification of sexual and gender violence as crimes in the Rome Statute means that judges in the Court will be required to regularly enter a judicial zone that is particularly watched by the community and in which they are expected to falter. In these circumstances, judges must provide rigorous and sensitive legal protection of the rights guaranteed, if public confidence is to be maintained.

The question of whether female judges are better equipped to provide this protection than their male counterparts is a complex one, the full exploration of which remains outside the scope of this paper. A few preliminary points, however, can be made. Women could impact on the nature of judicial decision making through potentially varied approaches to decision-making and by redressing elements of law which derive from distinctly male perspectives, such as those

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<sup>15</sup> This is despite the disparities in appointment and election were the subject of comment at the Beijing Conference, which building upon the Vienna Conference, called for intergovernmental organisations and governments to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant bodies, such as the [ICTY], the [ICTR] and the International Court of Justice, as well as other bodies related to the peaceful settlement of disputes." The United Nations General Assembly has also emphasised the importance of a commitment to "gender balance", urging member states to take "special measures," such as "presenting and promoting" more women candidates within both national and international institutions. Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Vienna, 12 July 1993): 37; Beijing Declaration and Platform for Action, UN Doc. A/CONF.177/20 (15 September 1995): 142(b)(c); G.A.Res. 51/69 adopted 12 Dec. 1996

<sup>16</sup> The institutions surveyed include the ICTY, ICTR, European Court of Human Rights, European Court of Justice, Inter American Court of Human Rights, European Court of First Instance, International Tribunal for the Law of the Sea, World Bank Inspection Panel, World Trade Organisation Appellate Body and International Law Commission: Coalition of the International Criminal Court, Gender of Judges of Members in International and Regional Institutions (April 2002). Available at <http://www.iccnw.org/html/new.html#Court>

<sup>17</sup> Id, this judge is Florence Ndepele Mwachande Mumba from Zambia

<sup>18</sup> Id, these judges are Navanethem Pillay from South Africa; Arlette Ramaroson from Madagascar and Andresia Vaz from Senegal.

<sup>19</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, (1994)

<sup>20</sup> Australian Law Reform Commission, "Equality Before the Law: Women's Access to the Legal System" *Discussion Paper*, No. 67 (1994) at paras 1.16 – 1.23.



concerning women's sexuality.<sup>21</sup> There is some evidence to suggest that this redress has already begun to take place in international tribunals by virtue of the participation of women judges, investigators, researchers, legal advisers, and prosecutors.<sup>22</sup> There is also a possibility that this approach will have a "flow on" effect that will increase the probability of male judges adopting similar liberal positions.<sup>23</sup>

However we should be careful about prioritising gender and marginalizing other elements of a women's identity such as culture and class, which also influence their decision-making. The recognition that there is neither one universal womanhood nor one universal patriarchy<sup>24</sup> is particularly important in the context of an international criminal court, which by its very nature will involve the consideration of the treatment of women from different geographical cultural, religious, economic, and historical backgrounds. The particular importance of cultural mores<sup>25</sup> and nuances in the context of sexual assault means that simply being female will not automatically give a judge the empathy and expertise to effectively handle these cases. In these circumstances, greater judicial education will be essential.

## Conclusion

This paper argues that in isolation a progressive legislative framework is inadequate for ensuring effective international prosecution of sexual violence and gender crimes against women. Underpinning the ability of the court to effect justice for women must be a solid network of structural provisions providing that there be a fair representation of women and men on the court and adequate expertise for dealing with sexual and gender violence. The national appointment processes and selection procedures (in their current draft form) will need to be revised in order to achieve this. While the female experience is not a universal one, the ability of female judges to recognise and value differences in women's experience and having the expertise and knowledge base to be sensitive to gender, is as Judge Pillay considered, one critical part of ensuring the success of these provisions.

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<sup>21</sup> B. Naylor, "Equality before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before the Law*" (1997) 23 Monash University Law Review 423 at 432-433.

<sup>22</sup> Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997) at 302.

<sup>23</sup> This has been confirmed by empirical research conducted in the United States. Research was undertaken into the decision making of state Supreme Court judges from 1982 to 1998 with the purpose of examining the decision making patterns of women judges, in the two substantive areas of obscenity and death penalty sentencing. The research found that women judges in state Supreme Courts tended to make more liberal decisions to uphold individual rights in both death penalty and obscenity cases. The researchers also found, equally importantly in their view, that the presence of a woman on the court tended to increase the probability that male judges would adopt a similar position. See D.R. Songer and K.A. Crews-Meyer, "Does Judge Gender Matter? Decision making in State Supreme Courts" (2000) 81 *Social Science Quarterly* 750.

<sup>24</sup> Hilary Charlesworth "Feminist Methods in International Law" 93 *American Journal of International Law* 379 (1999) at 384.

<sup>25</sup> As Fitzgerald notes, the effective adjudication of cases of rape and sexual assault requires an awareness of the particular cultural mores that inhibit testimony in sexual assault cases. See Kate Fitzgerald "Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law" 8 *European Journal of International Law* 638. Available at <<http://www.ejil.org/journal/Vol8/No4/art6.html>>



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# “Little Daffodils of Spring”

for Michelle A Taylor  
an extract from *Book of Flowers & Dedications*



**MTC Cronin\***

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\* MTC Cronin has had six books and one booklet of poetry published, the most recent being *My Lover's Back ~ 79 Love Poems*, (UQP, 2002). Her next book, *beautiful, unfinished ~ PARABLE/SONG/CANTO/POEM*, is forthcoming in 2003 through Salt Publishing (UK). She is currently teaching writing and working on her doctorate, *Poetry and Law: Discourses of the Social Heart*, at the University of Technology, Sydney, Australia

The killing is warm  
and separates us,  
keeps us going.  
We run to the dead  
as we never would  
to the living.  
There is a secret about this  
badly kept  
because we know the way  
life unworks itself.  
Yellow leaves the field for the eye.  
What is cruel finds history  
where it may shelter,  
find new legs,  
and again learn to walk.  
And there you are  
among the little daffodils of Spring  
sharing whatever is in your hands  
with all who can  
with some part of themselves  
love what grows.  
You know that judgement  
bends itself back to the judge.  
That justice  
is what the smallest flower knows.

# Women and Armed Conflict

## *A Little Progress*



Lee Galloway\*

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\* Lee Galloway has worked for 14 years in legal practice, mainly with the ACT Legal Aid Office, as well as private practice, specialising in areas of law affecting women and children. She is now working as a Legislative Counsel with the Cth Attorney-General's Dept, while completing a Masters of International Law at ANU

The destructive impact of armed conflict on women has in recent years moved to centre stage; in the context of international concern over violation of women's human rights and fundamental freedoms. The issue was identified in the Platform for Action, developed at the 4th World Conference on Women in 1995, as one of the 12 critical areas for priority action to achieve the advancement and empowerment of women.<sup>1</sup> The conference recognised that women experience the effects of armed conflict in ways which make them especially vulnerable – either by being attacked, displaced, detained, abducted, impoverished, or by being specifically targeted as members of the civilian population for sexual violence.

At the 23rd Special Session of the UN General Assembly in November 2000, governments affirmed their commitment to the implementation of the 1995 Beijing Platform for Action.<sup>2</sup> The Report of the UN Ad Hoc Committee, adopted by resolution of the Assembly, affirmed that violations of women's human rights in situations of armed conflict are breaches of fundamental principles of international human rights (IHL) law and international humanitarian law (IHL).<sup>3</sup>

The impact of armed conflict on women also remains a priority in the ongoing work of major international organisations – such as Amnesty International (AI, focussing on the integration of women's rights in human rights systems), and the International Committee of the Red Cross (ICRC, with its focus on implementation and dissemination of international humanitarian law). While these organisations are established to promote separate branches of public international law, at the junction of their interests in the needs of women, they recognise that IHL and IHRL are complementary legal responses, but that the task of addressing the needs of women during armed conflict goes beyond the traditional limits of the international legal regime.

These organisations have developed a more specific focus over recent years on the impact on women of armed conflict. The current emphasis is that, in addition to promotion of the existence of these rules, and in order to benefit women, it is necessary to mainstream a gender perspective in the prevalent understanding of armed conflicts, and in the operations of organisations assisting in the resolution and relief of armed conflict.

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<sup>1</sup> See Fourth World Conference on Women, (1995) *Platform for Action: 'Women and Armed Conflict'* <<http://www.org.womenwatch/daw/beijing/platform/armed.htm>>

<sup>2</sup> See *Report of the Ad Hoc Committee of the 23rd Special UN General Assembly*, adopted by resolution of the whole of that Assembly, entitled *Women 2000: Gender equality, development and peace for the 21st century (Beijing +5) – Further actions and initiatives to implement the Beijing Declaration and the Platform for Action*, A/S-23/10/Res.1 (2000). Called in this essay *the Ad Hoc Committee Report*.

<sup>3</sup> Ibid 2.

The point has been made in several studies<sup>4</sup> that women also participate in hostilities as combatants, or by offering support for combatants, and in this respect they are not necessarily vulnerable.<sup>5</sup> Further, men's (and boys') experience of the impact of armed conflict, and their representation as almost half of the world population of refugees and displaced persons, cannot be understated. The impact of armed conflict on men is often tied to the impact on women. Conversely, peace is inextricably linked with equality between women and men, and development.<sup>6</sup>

This essay proceeds with a focus on women's differentiated experience of armed conflict. The essay considers aspects of the role of international humanitarian law and human rights law in alleviating the adverse impact of that conflict on women; and finally, the approaches presently adopted by some major international organisations to address the situation of women in armed conflict.

It is now widely recognised that women experience armed conflict in different ways to men.<sup>7</sup> Women suffer most impact as civilians<sup>8</sup>, and constitute the majority of refugee and internally displaced adult populations<sup>9</sup>. Although predominantly non-combatants in armed conflict, there is injustice in the fact that women are often still the 'targets' of the weapons of war- of land mines, indiscriminate bombings, discriminate bombings of infrastructure installations, economic sanctions, direct physical attack, and deliberate 'gendered' forms of violence and persecution. Women experience armed conflicts as sexual objects and also as female members of ethnic, racial, religious, or national groups.

Significantly, women are also excluded from access to power structures and participation in decision-making with regard to armed conflict.<sup>10</sup> Women's concerns are largely unrepresented in international peacekeeping and security mechanisms (such as those established under the UN Charter)<sup>11</sup>. At the same time, women's lives are deeply (and at times adversely) affected by decisions of these bodies concerning distribution of humanitarian relief, and economic or military intervention.

In international humanitarian law (the law of armed conflict), women are afforded protection - both generally (as civilians, on the same basis as men) and in ways reflecting their particular needs as women. The provisions of the 1949 Geneva Conventions and Additional Protocols 1 and 2 of 1977 include a number of prohibitions. In all, there are some 50 provisions in IHL

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<sup>4</sup> Above note 1.

<sup>5</sup> On the other hand, the *Report of the Ad Hoc Committee of the 23rd Special UN General Assembly*, recognises the countervailing point that women (and children) may often be abducted or recruited in violation of international law into situations of armed conflict including, *inter alia*, as combatants, sexual slaves or providers of domestic services. Above note 2, 8.

<sup>6</sup> Ibid 8.

<sup>7</sup> See generally the findings of the International Committee of the Red Cross study *Women facing War* (2001) Geneva; and the ICRC statement to the UNHCR Global Consultations on International Protection, 4th meeting, Geneva (22-24 May 2002). This concept of women's differentiated experience of conflict is also explored in J Gardam and H Charlesworth, 'Protection of Women in Armed Conflict', (2000) 22 (1) *Human Rights Quarterly* 142.

<sup>8</sup> A Callamard, *Investigating Violations of Women's Human Rights in Armed Conflicts* (2001) Amnesty International Publications and the International Centre for Human Rights and Democratic Development, Canada, 9.

<sup>9</sup> UNHCR Statistical Report, *Women, children and older refugees: The sex and age distribution of refugee populations with special emphasis on UNHCR policy priorities* (19 July 2001) Population Data Unit, Population and Geographic Data Section, UNHCR.

<sup>10</sup> J Gardam, 'Women, human rights and international humanitarian law', [324] *International Review of the Red Cross* 421, at 431.

<sup>11</sup> Noted by the Ad Hoc Committee Report, above note 2, at 8.



that relate to non-discrimination or provide special protection for women.<sup>12</sup>

However, the limitations of IHL are significant, which challenges IHL to respond effectively in relation to women affected by armed conflict. Firstly, IHL applies only during a period of armed conflict<sup>13</sup> However, the impact of armed conflict on women continues long after the end of the conflict. Amnesty International has reported many examples of continuing violence, trauma and displacement suffered by women during civil unrest, and after hostilities have officially ceased – for example:

In the province of KwaZulu-Natal, scene of some of the most intense conflict in recent years, the April 1994 elections did not see an end to the violence. People are still [by the time of publication in 1995] being killed and maimed and having their homes destroyed. It has been estimated that between 800,000 and one million people have been displaced in KwaZulu-Natal since the late 1980's. Mrs Magwaza was one of a group of women who fled with their children to the sugar-cane fields on 8 July 1994 when armed men attacked and burned their homes in Umlalazi, northern KwaZulu-Natal. Five days later, overwhelmed by her circumstances and her inability to provide for her children, Mrs Magwaza hanged herself.<sup>14</sup>

Where the nation state has collapsed, and patchworks of territory are controlled by competing warlords, women are often caught in the crossfire, and suffer from the breakdown of central government and infrastructure. Amnesty International cites the situation in Somalia in 1992, where famine relief supplies brought into the country by US and UN troops had been stolen at gunpoint by armed troops. In this situation, the humanitarian role of the UN and US troops was also marred by their killing hundreds of unarmed Somali citizens in Mogadishu, including women on a protest demonstration.<sup>15</sup>

Gender-specific abuses continue in the context of peacekeeping operations and post-conflict reconstruction, where a gender-sensitive perspective is often absent.<sup>16</sup> Some of the problems identified include: failure to appoint women to key decision-making positions; the failure to acknowledge women's roles within the emergent political system; the marginalisation of female heads of households (while at the same time armed conflict creates or exacerbates this situation); the international community's lack of interest in mainstreaming issues of gender within their political and policy-making processes; the lack of feminist trainers in all areas within the staffs of local and international NGO's and UN agencies; and the lack of gender balance in the jobs available with NGO's, UN and OSCE operations.<sup>17</sup>

At the peacekeeping and post-conflict reconstruction stage, after the cessation of hostilities, women often remain vulnerable to violence and abuse, displaced, and impoverished, but this ongoing aspect of the destructive impact of armed conflict on women is beyond the scope of international humanitarian law.

Further, as many women's rights activists have consistently noted, the text of the Geneva Conventions and the additional protocols are lacking in gender-sensitivity, and the rules dealing

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<sup>12</sup> Callamard, above note 8, at 39.

<sup>13</sup> Except the 4th Protocol which deals with occupied territories.

<sup>14</sup> Amnesty International publication, *Human Rights are Women's Rights* (1995) 28.

<sup>15</sup> Ibid 33.

<sup>16</sup> See for example, the results of the gender audit conducted in Kosovo: Chris Corrin, *Gender Audit of Reconstruction Programmes in South Eastern Europe, the Case of Kosova*, Montreal and New York, cited in A Callamard, above note 8. Also, the Report of the 23rd Special Session of the UN General Assembly above note 2, 8.

<sup>17</sup> Ibid. These problems have been identified in the UN Ad Hoc Committee Report as serious obstacles in the area of women and armed conflict.

with women are presented as less important than others.<sup>18</sup> Neither Common Article 3 nor what are considered as grave breaches (under the Conventions and Protocols) explicitly include sexual violence. Throughout the Geneva Conventions, sexual violence is referred to as a crime of honour or against personal dignity and a distinction is drawn between torture and rape<sup>19</sup>. Article 27 of the 4th Geneva Convention states that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.'

The Geneva Conventions and Additional Protocols are inadequate as a satisfactory regime securing women's protection from the range of violations and obstacles arising from armed conflict. However, they specifically apply to women, and in combination with other human rights laws, can be said to adequately address the needs of women in situations of armed conflict at a normative level.<sup>20</sup> There is still scope for strengthening these laws by emphasis on the specific needs of women, and by stronger efforts at dissemination and enforcement of the rules.

This is the position of the International Committee of the Red Cross, which has made a long term commitment to the effective protection of women during armed conflict, and the appropriate assessment of the specific needs of women and girls in the ICRC's own operations.<sup>21</sup> It continues to promote international humanitarian law, but placing emphasis on the particular needs of women. In October 2001, the ICRC published a major study on the impact of armed conflict on women<sup>22</sup>. While the ICRC operates on a basic principle of providing assistance and protection to all victims of war without discrimination, it has encouraged its delegations to initiate programmes designed to address the specific needs of women caught up in conflict – whether they have been sexually abused, forced from their homes, or separated from their families.

However, some commentators have identified the limitations in international humanitarian law as fundamental flaws, which are inherently discriminatory against women.<sup>23</sup> This view points to the unreality of the rigid divisions between IHL, IHRL and refugee law, which set up artificial boundaries, so that IHL alone fails to consider the reality of warfare for women.

Proceeding from the limitations of IHL, a sensible focus for reform would therefore lie in reconceptualisation of the existing rules of IHL and IHRL.<sup>24</sup> By redrawing the boundaries, the application international law can be considered as a response to the continuum of women's experience of violence, in situations of armed and other conflicts, internationally and internally. This approach requires also that women's perspectives should be mainstreamed in the development of international law and policy, in all respects that influence the impact on women of armed conflict (in relation to conflict resolution, arms trade, and economic growth and development).

This approach has been adopted in the Beijing Platform for Action, particularly paragraph 141 which states: 'In addressing armed or other conflicts, an active and visible policy of

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<sup>18</sup> Gardam and Charlesworth, above note 10, 159.

<sup>19</sup> See J Gardam, 'Women and the law of armed conflict: why the silence?' in (1997) 46 (1) *International and Comparative Law Quarterly* 55; Callamard, above note 8, 40.

<sup>20</sup> ICRC, *Women facing War*, above note 7.

<sup>21</sup> At Geneva in 1999, the 27th Conference of the Red Cross and Red Crescent pledged to States and the Red Cross and the Red Crescent movement that it would place specific focus on making known to parties to armed conflicts the protection accorded to women by international humanitarian law, with emphasis on the issue of sexual violence.

<sup>22</sup> ICRC, *Women facing War*, above note 7.

<sup>23</sup> Gardam and Charlesworth, above note 10, 160.

<sup>24</sup> *Ibid* 164.

mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively.’

The goals of the Beijing Platform have been adopted by resolution of the 23rd Special Session of the General Assembly in November 2000, and the UN Division of Advancement of Women (DAW) has been established as a focal point for coordination and mainstreaming of gender issues in the UN system. Its mandate is to promote and support the mainstreaming of a gender perspective into the work of intergovernmental bodies, the policy and programmes of departments and offices of the United Nations Secretariat and the United Nations system, as well as at the national and regional levels.<sup>25</sup>

Amnesty International is working towards the integration of women’s rights in human rights systems, and gears much of its effort towards monitoring the adherence of governments and the international community to human rights agreements and treaties. It promotes accurate and consistent documentation of women’s rights violations, to ensure a gender perspective not only in relation to armed conflicts, but also peacekeeping efforts and operations, post-conflict reconstruction and more generally victims’ access to justice, redress and remedies. It also calls on international condemnation of governments which fail to protect women’s fundamental human rights. However, this effort is not without challenges, including security risks for activists and victims, problems with access to regions and witnesses, propaganda machinery affecting reliability of information, and the silence surrounding women’s rights abuses.<sup>26</sup>

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<sup>25</sup> DAW has also been the Secretariat of the four UN world conferences on women and the Special Session of the General Assembly *Women 2000: Gender Equality, Development and Peace for the Twenty-First Century (Beijing+5)*, and is responsible for servicing the CSW (Commission on the Status of Women) and the CEDAW (Convention for the Elimination of all forms of Discrimination against Women).

<sup>26</sup> Callamard, above note 8, 14.



# Rights to Economic Services in South Africa

## *Perceptions of Central African Refugee Women*



**Desire Timngum \***

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### Introduction

It is common parlance to articulate that refugee women and children are the most vulnerable groups of displaced people.<sup>1</sup> This consideration has been enhanced and corroborated by the dynamic and diverse factors that displace them across international and/or within national borders. While some politicians understand the consequences of forced population movements and the need to provide protection to displaced as specified in the 1951 UN Convention relating to the status of refugees and the 1969 OAU Refugee Convention, others tend to see them as undesirable forces of economic exploit and forces of evil.<sup>2</sup> The polemics, which undercut protection rest on whether protection to asylum seeking women can be effected, based on economic persecution? And secondly, can their economic rights be protected in an asylum state? What socio-economic role can they play in the development of the host community?

My paper examines perceptions of Central African refugee women in South Africa to access to economic services, problems encountered, their economic role, and attempts some recommendation.<sup>3</sup>

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<sup>1</sup> Crisp J, "Africa's refugees: patterns, problems and policy challenges," *Journal of Contemporary African Studies* (2000) 18(2) 157.

Crisp J, "A state of insecurity: the political economy of violence in Kenya's Refugee Camps" *African Affairs* (2000) 99 601.

<sup>2</sup>The 1951 UN Convention relating to the Status of Refugees can be viewed at: [www.unhcr.ch/refworld/refworld/legal/instrume/asylum](http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum)

<sup>3</sup> This paper is informed largely by my MA thesis on "socio-economic experiences of francophone urban refugees in South Africa" submitted to the Graduate School for the Humanities and Social Sciences, University of the Witwatersrand, Johannesburg.

## Access to economic services and the denial of justice?

Central African refugee women (from Cameroon, DRC, and Rwanda) in South Africa face many problems establishing their economic status in South Africa. First, there are contradictions in refugee law and policy. In South Africa as well as in many other Southern African countries seeking asylum is a complicated process due to ineffective melange or incorporation of international and regional refugee instruments into national laws. This complexity in asylum process has generated unnecessary delays and resulted in rejections of genuine asylum claims. Asylum seekers who applied for refugee status in South Africa before April 2000 were given Section 41 of the 1991 Aliens Control Act, which allowed them to work and study while awaiting decisions on their applications. Following the implementation of the 1998 Refugee Act No 130, in April 2000 and subsequent regulations asylum seekers are given permits under Section 22 of the new Refugee Act which prohibits work and study until their applications have been decided upon.<sup>4</sup> Even though, the South African Bill of Rights and the UN Covenant on Social and Economic Rights signed and ratified by South Africa do not discriminate people within the country on the basis on race, nationality, gender, and religion, asylum seekers in the country have to wait for decisions on their claims or apply for study and work permits to the Refugee Standing Committee after six months if no decision on their claims is arrived at. Secondly the asylum determination process is said to be unnecessary long which might see asylum seekers staying for years without any decision made on their claims.<sup>5</sup> The 1998 Refugee Act (No. 130) of South Africa does not allow asylum seekers to apply for asylum outside the country. Asylum seekers are supposed to apply for refugee status as soon as they enter the country at a refugee reception centre created by the Department of Home Affairs. This stage is known as pre-interview stage where asylum seekers cannot be sent back following the principle of *non-refoulement*<sup>6</sup> and interview is normally effected in a months time or after three months. After the pre-interview stage there is the initial interview where refugees are interviewed by hearing officers accompanied by interpreters. During this process the applicant has to answer the Department of Home Affairs Nationality Questionnaire, his identity documents or citizenship checked and the eligibility Form filled in. This form determines whether an applicant's claim is valid or not. At this stage there is no legal representation.

From the initial interview an applicant is given a Section 22 of the 1998 Refugee Act (No. 130). This is known as pending decision stage where an asylum applicant is notified that if his/her application is denied he will be advised to leave the country. Documents received from the interviewee are sent to the Standing Committee for Refugee Affairs where they will decide on the application of the applicant. If an application is refused the applicant is given 30 days to appeal the decision to the Refugees Affairs Appeal Board for reconsideration. Upon appeal the department will do some fast tracking of an applicants claim and if the claim is not valid it will be declared manifestly unfounded and the asylum seeker will be given time to obtain an approval from any country of their choice for their removal.

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<sup>4</sup> For more information on the South African refugee act visit the following website : <http://www.queensu.ca/samp/migdocs/Documents/1998/Refugee.pdf>

<sup>5</sup> Van Garderen "Surviving Asylum in South Africa: can refugees make a contribution to the socio-economic upliftment of the country and should they be given access to socio-economic rights?," seminar presented to Forced Migration Studies Programme of the Graduate School for the Humanities and Social Sciences, University of the Witwatersrand, Johannesburg, August 1999.

<sup>6</sup> (1951 UN Refugee Convention)

Furthermore, Section 26 of the South African Constitution does not give South African refugee spouses automatic rights to work and study while awaiting their permanent residence permits.<sup>7</sup> Even at the level of marriage the process becomes quite bureaucratic and full of bottlenecks. First asylum seekers or refugees are obliged by the Department of Home Affairs to cancel their status before lodging an application for a temporary permit, which prohibits work and study. However, a separate application can be made for work and study. What this means is that refugees have to go through this process before lodging an application for permanent residence (which can be rejected). Formal discussions with Central African refugee women who have undergone such an experience show dissatisfaction with the winding process as it can take them between six and eighteen months before they are granted permanent residence status.

Getting a permit is one thing and getting a job is another. In South Africa the employment sector is quite exclusionary and the institution of the affirmative action clause is mandatory. Some Central African refugees women contacted hold that their right to employment equity is hampered by deliberate attempts instituted by officials to outclass them. They said things like:

As a nurse you have to register with the South African Nursing Council, and it is very a difficult procedure and as a foreigner it is not easy;

Employers do not want to recognise my asylum permit, which allows me to work. Some employers will tell you that the permit is fake even though it is extended after every three months;

They told me that the job was advertised only for South African citizens;

I was rejected because that I am not a South African and I do not hold a South African identity document;

I was told that there is a law called Affirmative Action where any company in South Africa cannot employ foreigners or refugees;

My application was rejected because my permit is extended only for three months.

Another factor that has contributed to harsh regulations to exclude foreigners (including refugees) from employment is the local responses to refugee flows. Being employed or self-employed in South Africa has generated conflict between refugees and the host population.<sup>8</sup> A cross section of the South African folk believe that refugees flee economic situations in their home countries, and that they come to South Africa to take their jobs and/or are a net drain to the economy.<sup>9</sup>

In recent years xenophobic discourses against equal access to employment opportunities to refugee women and asylum seekers in South Africa have transformed from mere parlour talk to acute human rights violations expressed in physical abuse, intimidation and assault. Some angry local protesters have resorted to jungle justice activities in their bid to frustrate or send off foreign hawkers from Johannesburg street malls. A campaigner and a leader of this neo-nazist mob, Mr. Manikis Solomon once fumed that:

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<sup>7</sup> To read more about the South African Constitution visit:  
<http://www.polity.org.za/govdocs/constitution/saconst.html>

<sup>8</sup> Peberdy S & Majodina Z, "'Just a Roof Over my Head?': Housing and the Somali Refugee Community in Johannesburg" (2000) 11 (2) *Urban Forum*

<sup>9</sup> Peberdy S & Crush J, "Trading Places: Cross-Border Traders and the South African Informal Sector" *Southern African Migration Project*, Migration Policy Series, No. 6, IDASA, Cape Town, 1998.



These people are not welcome. No country would allow the mess Johannesburg has come to. We must clean up the streets of Johannesburg of foreign hawkers. The pavements of Johannesburg are for South African citizens and not for foreigners.<sup>10</sup>

The tussle between nationals and non-nationals appears to be surrounded by economic power-relations, mostly expressed over the competition for limited resources. This manifestation of socio-economic intolerance and sentiments towards refugees and asylum seekers by nationals is exacerbated by the fact that they (asylum seekers) have been able to work and study since 1993 while awaiting the outcome of their applications.<sup>11</sup> However, violent situations have forced the South African government to bow to domestic pressures. As mentioned earlier asylum seekers have to wait for decisions on their claims before they can access economic services (including self-employment under Section 22 of the Refugee Act of 1998). Gaining access to economic service is a human rights obligation to desperate people who have undergone persecution, trauma and depression.<sup>12</sup> This classical incident and state reaction or response to refugee flows indicates the extent to which states are willing to violate the rights of displacees in order to score domestic political points.

Even though, some refugee women and refugees in general might be employed in South Africa they tend to work in low-income employment and women are more likely to be unemployed than men.<sup>13</sup> The xenophobic ideological construction of Central African refugee women as a weaker force in economic development held by job creators or service providers puts them in a disadvantaged position.

The tricky situation has ushered in poor customer relationship between refugees who are legal and their local clients or hosts. Local clients buy at times on credit and never pay back. Refugee women complain that the police are of no help even if cases are reported. Informal discussions with refugee women further revealed that the police could act temporarily on certain cases provided that they are tipped. They also fumed that in situations where some of them have been coerced to bribe no action has been taken and at times they are advised not to pursue the case else they will be killed. Recounting their experience with their clients and the police some of them said things like:

My relationship with my customers is conflicting because some of them never pay my money and if I pursue them they say they will kill me if I dare ask them the money again;  
Some customers stay away with your money especially those who take on credit;  
Some borrow and never pay back but when you ask you are threatened;  
Some customers are xenophobic, they threaten you and call you names;  
Some customers are impressive, some are very supportive; some just talk to you as if you are not a human being;

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<sup>10</sup> Human Rights Watch, *"Prohibited Persons": abuse of undocumented migrants, asylum seekers, and refugees in South Africa*, New York, Human Rights Watch, 1998

<sup>11</sup> Okoth-Obbo G, "Does refugee protection in Africa need mediation?," (2000) 9(3) *Track Two* 40

<sup>12</sup> Handmaker J, "Who Determines Refugee Policy? Promoting The Right of Asylum in South Africa.", (1999) 11(2) *International Journal of Refugee Law* 290

<sup>13</sup> Dodson B, "Women on the move: gender and cross-border migration to South Africa" *Southern African Migration Project*, Migration Policy Series, No. 9, IDASA, Cape Town, 1998; Peberdy S & Majodina Z, "'Just a Roof Over my Head?': Housing and the Somali Refugee Community in Johannesburg" (2000) 11 (2) *Urban Forum*

Even when you report to the police they do nothing than advice you not to go after your money because you will be killed or they will want you to pay and pay and at times they do nothing to regain your money.

Given that central African refugee women face human rights issues getting employment one will tend to wonder whether they have any role to play in the host economy. And if that is the case what is their role? Existing research findings in South Africa suggest that self-employed non-nationals (including refugees and asylum seekers) contribute to the local economy through job creation and development of the informal sector through the transfer of skills and technical know-how.<sup>14</sup> If refugees women are forces of economic development then that view seems to be eluded in South Africa. But how do central African refugee women survive?

#### Coping with economic rights abuse or mutual economic benefits?

Despite the problematic nature of the employment sector in South Africa central African refugees especially Cameroonian refugee women have devised coping strategies. Some respondents are engaged in self-employment activities and they are found to be employing South Africans as a measure to reduce local unemployment and develop the informal business sectors or empower the least fortunate to be able to set up their own businesses and/or to be self-employed and self-supporting rather than depending on government to provide them with employment. Some serve as translators.

Other respondents consulted were involved in cross border trading. They were exporting computers, cell phones, bags, household equipment, compact discs, gold watches, jewellery, blankets, shoes, photocopiers, cosmetics, clothes, stationery, ladies hand bags, hats, handicraft, and fax machines to their home countries. In terms of imports things like; African dresses, food spices and foodstuff were imported. Informal discussions with some who could not do cross-border trading said things like:

I do not have money to be buying, buying and buying goods to sell here and there;  
I cannot do that because my friends usually complain that customs officials from South Africa usually seize their goods or ask them to pay very high amount of money to allow their goods to the country;  
I do not have enough capital and even if I have I do not have time to be fighting with the South African immigration officials or the police who want a lot of money in order for you to send or receive your goods.

Even though some refugee women might be employed, self-employed or dependent on community social networks for financial assistance their income is beyond expectation.

In terms of gender and class private and public institutions still see refugees in the light of negative economic contributions. Furthermore, even if their economic contribution might be

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<sup>14</sup> Rogerson C. M, "Local economic development and post-apartheid reconstruction in South Africa" (1997) 18 *Singapore Journal of Tropical Geography* 175; Dodson B, "Women on the move: gender and cross-border migration to South Africa" *Southern African Migration Project*, Migration Policy Series, No. 9, IDASA, Cape Town, 1998; Crush J, Ulicki T, Tseane I & van Vuuren J, "Undermining labour: migrancy and sub-contracting in the South African Gold Mining Industry," *Southern African Migration Project*, Migration Policy Series, No. 15, IDASA, Cape Town, 1999; Peberdy S & Crush J, "Trading Places: Cross-Border Traders and the South African Informal Sector" *Southern African Migration Project*, Migration Policy Series, No. 6, IDASA, Cape Town, 1998.

acknowledged it appears obscured by xenophobic sentiments pitting them against the host community and making their integration into the urban Johannesburg difficult and uncoordinated.

### Is there a way forward?

My paper has identified the extent to which asylum determination process, legal contradictions, public and private employers, host community resistance have impacted on the rights of refugee women to employment equity in South Africa. Though some developed countries understand the need and importance of international labour migration in structural economic setups and turn to maximize migrants' expertise and skills, the same situation with urban refugees in South Africa appears meaningless and vague to economic operators who are still skeptical about refugees' potentials in economic modernization. Lessons to learn.

The argument raised in this paper is that within the South African employment structure where refugee women are hindered from working by factors beyond their expectation the government tends to lose in terms of technical know-how, brain lose, international trade and cooperation as well as cultural diversity. Again massive rejections of refugee claims contrary to international instruments signed and ratified by the state renders the state weak (democracy), thus they might lose their prestige at the international arena, that is, international recognition and respect and the development of international humanitarian organizations.

Another point of departure is that the host population also loses in terms of exposure to different people with different languages, cultures, traditions, and identities. Whereas refugees turn to benefit only a bit in terms of constant creativity to live up to the situation though their health situation might be weakened because of their financial status.

While the world is drifting towards the new world economic order and the winds of globalisation are blowing fast and near it can be suggested that governments and refugees can only benefit mutually if economic restructuring founded on the basis of non-discrimination to race, gender, class, nationality and religion. Thus making the job and employment terrains accessible to all and more especially to those with specific expertise.

Furthermore, refugees and asylum seekers either women or men should not be situated within mainstream popular discourse as forces of economic underdevelopment but as agents of economic structural readjustment and revitalisation. Not all refugees are undereducated or ill educated and it becomes inherent for states to study refugee communities and select those with potentials and education and develop or use them. In the case of South Africa the country faces brain drain as most skilled people are leaving for greener pastures in diaspora and to bridge the gap refugees may be used for brain gain.

Lastly in order to achieve mutual economic benefits and coexistence political institutions or politicians and the media should do a lot more education that is educating the host population on the rights and obligations of refugees as well as the populations' responsibility towards them. However this might help to create a society where people will live in total security and harmony without any fear of harassment, racism, xenophobia and all related intolerances.



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# Untold Numbers

## *East Timorese Women and Transitional Justice*



**Susan Gail Harris\***

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\* ANZSIL Conference Paper, Friday 14 June 2002: Susan Gail Harris is a Human Rights Policy Officer, Australian Council for Overseas Aid BA(Hons)/LLB(Hons) UQ, SJD Candidate ANU

### Introduction

In 2001, it seemed that East Timor had a unique dilemma. International criminal law had evolved to a state where impunity for war crimes was finally under pressure from a series of successful prosecutions and convictions by ad hoc tribunals, and the advent of the International Criminal Court. International practice had developed to the point where the newly elected East Timorese government should have been in a position to make some choices about how to achieve justice and reconciliation, even if bounded choices. However, despite these ground-breaking developments in the area of international criminal law, and the prosecution of gender based crimes within that jurisprudence, justice for East Timorese women seems to move further out of reach.

My contention is that the few substantive options that existed for dealing with transitional justice in Timor are fast vanishing and that one of the major casualties of this will be justice for women.

This paper will focus on the case of *The Prosecutor v Leonardus Kasa*, decided by the Special Panel for Serious Crimes in May 2001.<sup>1</sup> I argue that the case has extremely significant implications in itself, and for the way rape and sexual violence prosecutions may be treated in the Lolotoe crimes against humanity cases currently before the Special Panel.<sup>2</sup>

The performance of the Serious Crimes Court is also considered a crucial issue for transitional justice in East Timor because it is the only “internationalised” body at present dealing with the violence in East Timor, if within a very limited time-frame,<sup>3</sup> and because the Court has adopted substantial provisions of the International Criminal Court Statute and can therefore be

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<sup>1</sup> *The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa*. Dili District Court Special Panel for Serious Crimes Case no. 11/CG/2000, 9 May 2001. (*The Kasa Case*)

<sup>2</sup> *The General Prosecutor of the United Nations Transitional Administration in East Timor v Joao Franca Da Silva alias Jhoni Franca, Jose Cardoso Ferreira alias Mouzinho and Sabino Gouvias Leite*. Dili District Court Special Panel for Serious Crimes Case no. 4/CG/2000. (*The Lolotoe Trial*)

<sup>3</sup> Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili' (2001) 2 *Melbourne Journal of International Law* 414, 458. Suzannah Linton notes that an ad hoc international criminal tribunal will not necessarily deliver justice more effectively than the Serious Crimes Court due to the same issues with resources and lack of Indonesian cooperation.

considered the first state application of the new global provisions.

This paper postulates that there are four key interrelated threats to the transitional justice outcomes that are demanded by Timorese women. First, the relationship between proposed amnesty laws may hamper the mandate and effectiveness of the Commission for Reception, Truth and Reconciliation. Second, the Security Council continues to reject an international criminal tribunal for East Timor. Third, the Indonesian ad hoc Human Rights Court has so far failed to meet even basic objectives as enumerated by the recent International Crisis Group report.<sup>4</sup> Finally, the rejection of jurisdiction in the *Leonardus Kasa* case by the Serious Crimes Court, the subject of this paper, may be considered a serious impediment to obtaining most of the perpetrators from West Timor for trial.

The *Kasa* case has been chosen because it throws into relief the interrelatedness of all these threats. It also illuminates three key points. First, the case illustrates that no knowledge of the international advances in the prosecution of gender-based crimes was discussed or applied in the judgment. Second that the trial proceeded without any reference to the context of systematic gender-based violence in West Timor; and third, that the outcome for the alleged victim has been actually worsened rather than improved by the outcome of the case.

The methodology of the paper applies the feminist thesis of Hilary Charlesworth and Christine Chinkin's text *The Boundaries of International Law* to the current Timor situation to test whether international criminal law has been "transformed" to meet the female experience of armed conflict, or is still limited and fundamentally flawed.<sup>5</sup> The authors analysed recent developments in international criminal law and concluded that although precedents in prosecuting gender-based crime might mean that "the silence about the suffering of women in all forms of conflict has been broken", there were still serious shortcomings.<sup>6</sup>

These limitations include the fact that crimes are still required to be wide-spread and systematic, and as the authors point out "although the rapes and sexual violence in the former Yugoslavia have been perceived in such terms, this may not always be the case. There is a tendency to regard the sexual abuse in the former Yugoslavia as exceptional and not as a regularly occurring part of armed conflict."<sup>7</sup>

They also point to an inadequacy of international legal remedies that provide long-term, financial and practical assistance,<sup>8</sup> and that international law emphasises only women's sexual

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<sup>4</sup>International Crisis Group, *Indonesia: Implications of the Timor Trials*, Indonesia Briefing, 8 May 2002.

<[www.crisisweb.org](http://www.crisisweb.org)>

<sup>5</sup>Hilary Charlesworth and Christine Chinkin, *The Boundaries of International law: A feminist analysis*, Mellan Schill Studies in International Law, Manchester UP, 2000.

<sup>6</sup>Ibid 330.

<sup>7</sup> Ibid 333. A good recent example of this is the adverse reaction of the US State Department to a report called *License to Rape* by a Burmese women's group reported by ABC radio. ABC reporter Barbara Heggen notes "Rape is an increasingly common weapon of war, as witnessed in the conflict in the former Yugoslavia. Now, according to a new report from a human rights group in Burma, it's being used by the military in that country on a regular basis." ABC Radio Australia, "BURMA: Allegations rape is being used as a weapon by the military", *Asia-Pacific program*, 5 July 2002.

<<http://www.abc.net.au/ra/asiapac/programs/s600053.htm>>

<sup>8</sup>Above note 5, 333.



and reproductive identities and only harms inflicted by opposing forces.<sup>9</sup>

This seminal “reframing” of international law in feminist terms is consistent with a wider rethinking of women’s rights as human rights over recent decades, pressuring for a shift from traditional definitions of human rights as state-sponsored terrorism, torture and imprisonment to a broader view, which includes gender-specific acts such as domestic violence, female genital mutilation or trafficking.<sup>10</sup>

### Advances in the Prosecution of Gender-based International Crimes

It may appear that the long aeon of impunity for war crimes is coming to a close by dint of international cooperation. The jurisprudence of the Nuremberg and Tokyo Tribunals after World War II has been strengthened by the practice and judgments of the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The Statute of Rome, which created an International Criminal Court (ICC) to try genocide, war crimes and crimes against humanity, is a reality at last. There are also several credible models of Truth and Reconciliation Tribunals, such as South Africa and Chile. There are new hybrid “internationalised” criminal tribunals such as Sierra Leone. Many states have implemented domestic legislation to cover war crimes such as genocide and are exercising universal jurisdiction, as in the case of Belgium.

In relation to prosecutions for gender-related crimes in international criminal law, the precedents have been even more revolutionary. Both the ICTY and ICTR have successfully indicted, prosecuted and convicted defendants for gender-based crimes for the first time in history, including rape as a crime against humanity and an element of genocide in *Akayesu* case before the ICTR<sup>11</sup>, and the *Celebici*, *Furundzija* and *Kunerac* cases relating to rape as torture, sexual slavery and sexual acts as inhumane treatment.<sup>12</sup> Article 5(g) of the new International Criminal Court Statute explicitly enumerates rape as a crime against humanity. A unanimous Security Council Resolution 1325 (2000) was passed on the topic of “Women, Peace and Security” urging the Secretary-General to carry out a study on the impact of armed conflict on women and girls, and the role of women in peace-building. There have been significant decisions by regional human rights courts, such as *Mejia Egocheaga v. Peru* in the Inter-American Commission of Human Rights.<sup>13</sup> It is these developments to which Charlesworth and Chinkin refer when they state “the silence about the suffering of women in all forms of conflict has been broken”.<sup>14</sup>

### The East Timorese Context

Gender-based international crimes in East Timor have been widespread since 1975 and was rife

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<sup>9</sup> Ibid 334.

<sup>10</sup> Bettina Aptheker, “Women Become Human”, Review of Women, Gender and Human Rights; A Global Perspective (2002) Vol. XIX, No. 8 *The Women's Review of Books* 17.

<sup>11</sup> *Prosecutor v. Jean-Paul Akayesu*, 2 September 1999, ICTR-96-4-T.

<sup>12</sup> *Prosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23/1-T, 22 February 2001; *Prosecutor v. Anto Furundzija*, 10 December 1998, ICTY-95-17/1-T.

<sup>13</sup> (1996) 1 Butterworths Human Rights Cases 229; above note 5, 330-2.

<sup>14</sup> Above note 5, 330.

in the 1999 violence, according to evidence collected by the United Nations,<sup>15</sup> human rights NGOs such as Amnesty International,<sup>16</sup> the Indonesian Human Rights Commission KPP Ham,<sup>17</sup> Australian journalists,<sup>18</sup> and most importantly, according to data and stories from East Timorese NGOs themselves.<sup>19</sup> Of the 1999 violence, Bishop Belo has written: "Up to 3,000 died in 1999, untold numbers of women were raped and 500,000 persons displaced - 100,000 are yet to return."<sup>20</sup>

The phrase "untold numbers of women" is poignant, and literal – the story of women's experience before, during and after the 1999 violence remains largely untold despite the extraordinary efforts of Timorese women advocates. Leading women's NGO Fokupers has documented 46 cases of rape during the 1999 violence: nine of them by Indonesian soldiers, 28 by pro-Jakarta militias, and nine of them joint attacks by militias and soldiers. Eighteen were categorized as mass rapes.<sup>21</sup> "Many of these crimes were carried out with planning, organisation and coordination," a Fokupers report states. "Soldiers and militias kidnapped women together and shared their victims."<sup>22</sup>

David Senior, sexual violence investigator at the Special Crimes Unit noted that in all but one of the cases examined by him, the victims were the wives, daughters or sisters of pro-independence guerrillas and activists. "I believe that it's hand in hand," he told AFP in late 2001.<sup>23</sup> He also noted in a New York Times interview that "numbers alone do not tell the story". "How do you put a number on 5 women being raped by 12 guys?" he said. "How do you put a number on a woman being raped daily for six months? How do you put a number on one girl being raped by three guys for five nights? For me, numbers don't describe the impact that rape has had on the women of East Timor."<sup>24</sup>

The obvious question arises - why has the issue of rape and sexual violence experienced by East Timorese women been such a non-issue for the international community in comparison to Bosnia, and even Afghanistan? What will this lack of attention and recognition mean for Timorese women?

This question is especially critical due to the strong claim from women's groups in East Timor

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<sup>15</sup> See especially the Report of the International Commission of Inquiry on East Timor To The Secretary-General. UN Document A/54/726; 31 January, 2000. Report of the Security Council Mission to Jakarta and Dili, S/1999/976, 14 September 1999; Report of UN Special Rapporteurs: Situation of human rights in East Timor. Based on visit between 4-10 November 1999. UN Document A/54/660, 10 December 1999 <<http://www.jsmp.minihub.org/Reports/special%20rapp%20report.pdf>>

<sup>16</sup> Amnesty International, *EAST TIMOR Justice - past, present and future* (27 July 2001) AI Index ASA 57/001/2001.

<sup>17</sup> Indonesian Human Rights Commission, *Indonesian KPP-Ham Report* (2000) 31 January. <[www.jsmp.minihub.org](http://www.jsmp.minihub.org)>

<sup>18</sup> Hamish McDonald, Desmond Ball, James Dunn, Gerry van Klinken, David Bouchier, Douglas Kammen, and Richard Tanter *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*, Strategic and Defence Studies Centre, Australian National University (Canberra Paper #145), 2002.

<sup>19</sup> Natércia Godinho, *UN Security Council 'Arriaformula' meeting on the implementation of Security Council Resolution 1325* (2001). <<http://www.pcug.org.au/~wildwood/01octwomen.htm>>

<sup>20</sup> Bishop Carlos Belo, "To forge a future, Timor needs justice for the past" *Sydney Morning Herald*, 28 August 2001. <<http://www.jsmp.minihub.org/Reports/Belo.htm>>

<sup>21</sup> AFP, "Scars of vote violence remain real for many East Timor women" 19 November 2001.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Seth Mydans, "Sexual Violence as Tool of War: Pattern Emerging in East Timor" *The New York Times*, 1 March 2001. <<http://www.pcug.org.au/~wildwood/01marrape.htm>>

that it was women who have suffered the most since the 1975 occupation to the present day. According to the East Timorese Women's Network. "Of all the victims of Indonesian military violence the greatest suffering was borne by women, who, up to this time, have not met with the justice they hoped for."<sup>25</sup>

Angelina Saramento, an activist from the Timorese NGO KSI states:

From 1975 up to now, women are the ones who suffer more than the men. For example their husbands stay in the jungle, the women stay alone. Then the military came and asked them, where is your husband and they take control of other person's wife, so this is a kind of violation against women. This kind of thing happened all over East Timor so I think women are the ones who really suffered. In order to see how the women can get justice is hard – because in our culture the women sometimes keep quiet, doesn't talk too much, so it is hard for women to give their aspirations or talk in public – to the abat, the court, Truth Commission.<sup>26</sup>

She contends that this should directly impact on decisions about transitional justice:

There are many contradictory ideas – for example, on the leaders' side, Xanana a few months ago mentioned an amnesty – was he talking on the side of the victims or on the side of the political leaders, their perspective? For those who still really suffer, is not the leaders, but the main victims were the civilian people, so in order to make a decision as to how to bring the perpetrators to the court or whether to give an amnesty, the leaders have no right to decide it because they are not the ones who really suffered through the troubles.<sup>27</sup>

An article called "Raping the Future" concurred that:

Since their homeland was invaded in 1975, the women of East Timor have felt the brunt of some of the Indonesian military's most egregious human-rights violations: They have been raped in the presence of family members, forced to marry Indonesian soldiers, subjected to torture by electric shock, sexually abused, and forcibly sterilized. East Timorese women have been forced to bear much of the load of what many believe is an Indonesian government plan to eliminate the East Timorese culture.<sup>28</sup>

This article was based on a report published by Miranda Sissons of the East Timor Human Rights Centre in Australia, which alleged that the Indonesian government targeted indigenous Timorese in particular for "reproductive oppression" and that these practices might constitute a breach of the international Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits intentional limitation of births within a specific national, ethnic, religious, or racial group.<sup>29</sup>

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<sup>25</sup>East Timor Institute for Reconstruction Monitoring and Analysis "Editorial: Women and the Reconstruction of East Timor." (2001) 2 (5) *La'o Hamutuk Bulletin* .

<sup>26</sup>Interview with Angelina Saramento (KSI, Dili, 23 January 2002).

<sup>27</sup>*Ibid.*

<sup>28</sup>Tim Eaton, *Raping the Future*, August 1999. Based on report by Miranda Sissons *From One Day to Another: Violations of Women's Reproductive and Sexual Rights in East Timor*, East Timor Human Rights Centre, Australia, 1997. <[www.pcug.org.au/~wildwood/violence.htm](http://www.pcug.org.au/~wildwood/violence.htm)>

<sup>29</sup>*Ibid*; the report states "The first phase began from the time of the Indonesian invasion and extended through the mid-1980s. The report alleges that Indonesian soldiers raped and impregnated East Timorese women and girls, mutilated pregnant women, and covertly sterilized them. The second phase, which extended to the late 1990s, saw further covert sterilization and coerced contraception of East Timorese



Sexual violence in the home remains a key priority for East Timor with frightening levels of domestic violence reported in every District, although there have been some recent high profile court cases.<sup>30</sup> A Jordanian UN peacekeeper was indicted of rape of an Oecussi woman on 21 August 2001 in a Dili court.<sup>31</sup> There is also a serious campaign by activists including the new First Lady of East Timor, Australian Kirsty Sword Guasmo, to obtain the release of several young women in the refugee camps of West Timor who are thought to be being held against their will as “war trophies” by militia leaders.<sup>32</sup> Many older Timorese women recently expressed distress at the arrival of the Japanese “Self-Defence” forces because they had been forced to be “comfort women” during World War II when the Japanese had occupied East Timor.<sup>33</sup> In brief, gender-based crime is a substantive and pressing issue in East Timor.

Two insights flow from this analysis. The first is that transitional justice solutions in East Timor will have to look beyond the 1999 violence to cover the whole of the Indonesian occupation. Hilary Charlesworth has noted that international law can be considered a “discipline of crisis” and notes: “One major silence is the position of women in the representation of crises. The players in international law crises are almost exclusively male... The lives of women are considered part of a crisis only when they are harmed in a way that is seen to demean the whole of their social group.”<sup>34</sup> The Commission for Reception, Truth and Reconciliation has in fact adopted the 1975 time frame, but not the Serious Crimes Court or the Indonesian ad hoc Human Rights Court.

Secondly, if you accept the proposition that the greatest suffering during the violence may have been borne by women, then according to principles of equality and non-discrimination, women should have a substantial input in what type of justice they require and it should be designed to fit, not exclude the female experience. This should also extend to broader social policy.<sup>35</sup> How does the Leonardus Kasa case, the first trial to deal with gender-based crime in East Timor, measure up to these basic requirements?

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women through the World Bank-funded population control program, Programa Keluarga Berencana (commonly known as the KB program).” See also Matthew Jardine, *East Timor: Genocide in Paradise*, Odonian Press, 1995, at 62; and for a contrary view, see Ben Saul, “Was the Conflict in East Timor ‘Genocide’ and Why Does it Matter?” (2001) 2 (1) *Melbourne Journal of International Law* 477.

<sup>30</sup> Manuela Leong Peirera, “Domestic Violence: A Part of Women’s Daily Lives in East Timor” (2001) 2 (5) *The La’o Hamutuk Bulletin*. <<http://www.pcug.org.au/~wildwood/violence.htm>> Note the case of Dr Sergio Lobo in particular.

<sup>31</sup> East Timor Institute for Reconstruction Monitoring and Analysis, “Commentary: International Security Forces and Sexual Misconduct” (2001) *The La’o Hamutuk Bulletin*. <<http://www.pcug.org.au/~wildwood/01augwomen.htm#misconduct>>

<sup>32</sup> Diane Farsetta, “East Timorese Refugees in Militia-Controlled Camps” in Magdalene Hsien Chen Pus (ed), *The Devastating Impact of Small Arms & Light Weapons on the Lives of Women: A Collection of Testimonies* (2001), WILPF for International Action Network on Small Arms (<http://www.iansa.org>) Women’s Caucus. <<http://www.pcug.org.au/~wildwood/01julmilitiacontrolled.htm>>

<sup>33</sup> Jill Jolliffe, “Timor’s haunted women” *The Age*, 3 November 2001. Note the case of 15-year-old Juliana dos Santos in particular. <<http://www.pcug.org.au/~wildwood/01novwomen.htm>>

<sup>34</sup> Hilary Charlesworth, “International Law: A Discipline of Crisis.” (2002) 65 *The Modern Law Review* 377, 389.

<sup>35</sup> Above note 28. For example, Timorese women will need to rebuild their faith in health workers for example, and Timorese women also demand that the practice of the “bride-price” might need to be re-examined by the society due to the way it seen to have promoted domestic violence.

### The *Leonardus Kasa Case*<sup>36</sup>

The facts of the case are straightforward. Leonardus Kasa was an alleged member of Laksaur militia from Cova Lima district. He was arrested and detained by CivPol, pursuant to the Indonesian Criminal Procedure Code. The Public Prosecutor, Raimund Sauter indicted him in December 2000 with one charge of rape of a woman in Betun village, West Timor in September 1999. At the preliminary hearing in February 2001 the defence claimed the Special Panel lacked jurisdiction to hear the case as the alleged rape occurred outside the territory of East Timor, and that as the sex was consensual, it should be classified as adultery, which is not a serious crime.

On 9 May 2001 the Special Panel declared that it had no jurisdiction in the case. The defendant had already been released from detention in February 2001 but had been prevented from approaching the victim's home. Immediately after the judgment was given, the Special Panel announced that such restrictions on the defendant no longer applied.

The judges of the Special Panel were Luca I. Ferrero (Presiding Judge, Italy), Maria Natercia Gusmao Pereira (Judge Rapporteur, East Timor) and Sylvester Ntukamazina (Burundi). They stated that the same charges might be raised before courts in Indonesia, or in East Timorese courts if the current regulations are later to be amended. The Special Panel also emphasised that it made no finding as to the defendant's innocence or guilt on the charge of rape.

The background to this set of facts is well-known. A popular consultation was held on 30 August 1999 where over 80% of East Timorese voted for independence from Indonesia. Militias, organised and supported by the Indonesian military, forcibly removed up to 250 000 Timorese into camps in West Timor and wreaked widespread and systematic violence on those perceived to be pro-independence supporters and their property. The alleged victim in this case, Maria da Costa and her two children were displaced on 5 September 1999 from East Timor and brought to a refugee camp located in the warehouse of Betun in West Timor.

The indictment does not refer to this context. The defendant claimed not to be aware of the chaos around him. The New York Times reported in early 2001: "In an interview at the Dili courthouse, Mr. Casa put forward a defense that... he knew his victim. She belonged to him. The sex was consensual. Beyond that, Mr. Casa said, he knew less than just about anybody else in East Timor about the violence occurring around him. "I never saw any massacre or any destruction," he said. "I never even left my house."<sup>37</sup>

### Applicable Law

The Prosecutor charged Kasa with the crime of rape in violation of Section 9 of UNTAET Regulation 2000/15<sup>38</sup> and Article 285 of the Penal Code of Indonesia.

Section 9 "Sexual offences" merely states that the provision of the applicable Penal Code in East Timor shall, as appropriate, apply.

The Special Panels were established, within the District Court in Dili, pursuant to Section 10 of

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<sup>36</sup> *The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa*. Dili District Court Special Panel for Serious Crimes Case no. 11/CG/2000, 9 May 2001.

<sup>37</sup> Above note 24.

<sup>38</sup> 2000/15 Establishment of panels with exclusive jurisdiction over serious criminal offences. UNTAET/REG/2000/15 6 June 2000 <<http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>>

UNTAET Regulation No. 2000/11,<sup>39</sup> in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of UNTAET Regulation 2000/15. The panels are explicitly stated to have universal jurisdiction for genocide, war crimes, crimes against humanity and torture, but not murder or sexual offences, which follow the Indonesian Penal Code.<sup>40</sup> The sexual offences in the Penal Code are contained in the section “Crimes Against Decency”. Adultery is a criminal offence under Article 284(1), and the definition of rape is “any person who...forces a woman to have sexual intercourse with him out of marriage” (Article 285).<sup>41</sup>

The definition of international crimes, however, is taken almost verbatim from the subject matter jurisdiction of the *Rome Statute of the International Criminal Court* (ICC).

The Special Panel for Serious Crimes is directed to apply three sources of law. The first is UNTAET Regulations and directives. The second is applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict. The third source is the law applied in East Timor prior to 25 October 1999, until replaced by UNTAET Regulations or subsequent legislation, insofar as they do not conflict with either the internationally recognized human rights standards; the fulfillment of the mandate given to UNTAET under the Security Council Resolution 1272 (1999); or UNTAET Regulations or directives.

### Key Elements of the Decision

The Special Panel cited the arguments from the Prosecutor regarding jurisdiction who was aware of potential problems from the indictment stage. His motion read:

Since the crime (of rape) was committed outside East Timor and since it does not belong to the crimes listed under Sect. 10.1 (a), (b), (c) and (f) of U.R. 2000/11 as specified in Sect. 4 to 7 of U.R. 2000/15 for which the Special Panel of the District Court of Dili shall have “universal jurisdiction” the jurisdiction of the Special Panel might be questionable.<sup>42</sup>

The Prosecutor instead based his case on the extraterritorial provisions in the Indonesian Criminal Code which he argued should be applied *mutates mutandis* to this situation.

It was undisputed that the crime occurred outside the East Timorese territory. The Special Panel worked through the criteria used to determine the applicability of national criminal law to crimes that occurred out of the country: (a) universality (or total extraterritoriality), (b) territoriality, (c) active personality (or nationality, or personal status) of the perpetrator and (d) defence. They noted: “Modern states usually don’t adopt a single principle. They rather choose

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<sup>39</sup> 2000/11 Organisation of Courts in East Timor (Amended by Regulation 2001/25)  
<<http://www.un.org/peace/etimor/untaetR/Reg11.pdf>>

<sup>40</sup> Establishment of panels with exclusive jurisdiction over serious criminal offences.  
UNTAET/REG/2000/15, 6 June 2000

<sup>41</sup> Note Suzannah Linton “Experiments in International Justice” (2001) 12 *Criminal Law Forum* pp.210-211; the ICTR defined rape in the *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment 2 September 1998, as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive” at paras 6.4 and 7.7.

<sup>42</sup> *The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa*. Dili District Court Special Panel for Serious Crimes Case no. 11/CG/2000, 9 May 2001, at 3.



a combination between territoriality and other principles. It can be said that the kind of combination depends on the international relations of the state.”<sup>43</sup>

The Special Panel decided that the United Nations transitional administration had chosen to adopt the principle of territoriality with very few exceptions:

This choice could be said mandatory for a transitional administration empowered by the United Nations Security Council, which has also the mandate of administration of justice. How could such a temporary and ‘neutral’ administration have jurisdiction for crimes committed out of the territory administrated?<sup>44</sup>

The judges relied on Section 5 of UNTAET Regulation 2000/11, which provides that: in exercising jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Section 3.1 of UNTAET Regulation 1999/1. Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Sect. 3.1 of UNTAET Regulation 1999/1 or any other UNTAET regulations.

The alleged rape occurred in September 1999.

The Panel decided that the only exception to that principle is contained in Section 2.2 of UNTAET Regulation 2000/15, which grants the Panel universal jurisdiction for the crimes of genocide, war crimes, crimes against humanity and torture.

The Special Panel noted that these crimes “deserve universal jurisdiction due international customary laws and (more recently) international laws. That means that the aforementioned Indonesian rules are no longer applicable because they are not consistent with UNTAET Regulation and the principles of the UN mandate.”<sup>45</sup> The Special Panel did not accept the Prosecutor’s use of *mutates mutandis*.

Therefore, the Special Panel deemed that the applicable criminal law to case is Section 9 and Article 285, but only Indonesia has the jurisdiction on the case. The East Timorese courts and the Special Panel of Dili District Court itself did not have jurisdiction upon a crime of rape committed in West Timor before 25 October 1999.

The Special Panel pronounced: “It means that no East Timorese Court, according to the laws in force at the present time, could try this case.”<sup>46</sup>

### Analysis of the Judgment

The Judicial System Monitoring Programme (JSMP) in East Timor provided the following

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<sup>43</sup>*The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa* at 4.

<sup>44</sup>*The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa* at 4.

<sup>45</sup>*The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa* at 5.

<sup>46</sup>*The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa* at 6.

succinct analysis, which highlighted the increased pressure the decision put on Indonesia to prosecute:

According to the Special Panel, the universal jurisdiction they have over the international crimes of genocide, war crimes, crimes against humanity and torture, does not extend to individual cases of murder and sexual offences, including rape.

Although rape and murder committed between 1 January and 25 October 1999 are considered "serious crimes" by UNTAET, yesterday's decision means that no suspected perpetrators of such crimes, if committed in West Timor, can be tried by the Special Panel of the East Timorese courts unless the crimes can be categorised as any of the international crimes over which the court enjoys universal jurisdiction.<sup>47</sup>

With respect, the Special Panel erred in its consideration of the active personality (or nationality) of the perpetrator as a basis of jurisdiction. The "passive personality" principle which grants a state jurisdiction to try a crime where the victim is a national of the state should also have received more attention.

Universal jurisdiction is generally only relied upon where the crime is a gross human rights violation; and there is no link with the territory where the crime took place, the offender or the victim.<sup>48</sup> There was no impediment to assessing the other grounds of jurisdiction under customary international law, especially nationality, even if universal jurisdiction in this case was found not to exist, on the facts as well as on the judicial interpretation of the Regulation. The Special Panel is able to apply "recognised principles and norms of international law" and it is unarguable that the extra-territorial application of criminal jurisdiction in certain circumstances, for example, on the ground of the nationality principle is one of these norms.<sup>49</sup>

The nationality principle (active personality principle) is well accepted as part of international customary law and is a counterpart of principle that States do not extradite their own nationals. In this case the defendant was an East Timorese citizen by birth and residence. This was a clear, strong ground for jurisdiction, even if the rape was charged only as a domestic crime.

The passive personality principle is less straightforward, as was seen by the Eichmann trial and in the recent Pinochet proceedings. It sometimes has a treaty basis, such as Article 5(1)(c) of the Torture Convention. The principle applies when the victim of the act was a national but the act occurs outside the State's territory, usually where the perpetrator is not a national of the State and the act is in the nature of terrorist or other organised attack.<sup>50</sup> The victim in this case was an East Timorese citizen, and the act may be seen as part of a systematic attack and forced

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<sup>47</sup> Judicial System Monitoring Programme (JSMP) "Dili Court increases pressure on Indonesia" Dili, 10 May 2001. <[http://www.jsmp.minihub.org/News/news9\\_5.htm](http://www.jsmp.minihub.org/News/news9_5.htm)>

<sup>48</sup> See further International Law Association Committee on Human Rights Law and Practice, "Final report on the exercise of universal jurisdiction in respect of gross human rights violations", in *Report of the Sixty-Ninth Conference*, London 2000, pp. 403-431.

<sup>49</sup> International Committee of the Red Cross, "National Enforcement of International Humanitarian Law: Universal jurisdiction over war crimes" <<http://www.icrc.org/Web/eng/siteeng0.nsf/d268e7e7eea08ab74125675b00364294/39587781f62ff7f4c1256b66005c8cf1?OpenDocument>> at 20 July 2002; above note 5, 19, Charlesworth & Chinkin ask "Why is extra-territorial jurisdiction traditionally involved against violations of monopoly and competition law but only rarely in cases of trafficking of women and children?"

<sup>50</sup> See further *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991)..

relocation on the Timorese people after the ballot. Likewise, the defence (or security) principle is based on the State's right to self-protection and is closely connected to the territorial principle. Given the percentage of the population forcibly removed to West Timor, this ground may possibly have been invoked with corroborating evidence.

Both the Prosecutor and the Special Panel were incorrect in deciding that the principle of jurisdiction based on nationality would have to be applied *mutates mutandis* on the basis of the express provision Article 5(1)(2) of the Indonesian Code (in the case of the Prosecutor) or by construction of the UNTAET regulations (in the case of the Special Panel). The Panel could have considered extraterritorial jurisdiction over a domestic or international crime based on the customary international law principle of nationality. In either case, cooperation with Indonesia would have been a major stumbling block for the extradition of the accused, but in this case the accused was already under arrest within East Timor in the initial stages of the trial.

Had the Prosecutor charged the case as an international crime, the jurisdictional arguments would have fallen out quite differently and the whole issue could have been easily avoided. Both the Prosecutor and the Special Panel seemed to completely fail to entertain the idea that a single rape could have been characterized as a crime against humanity if part of a "widespread and systematic attack" as envisioned by Section 5.1(g); a war crime under Section 6.1(b)(xxii) in an international armed conflict or Section 6.1(e)(vi) in a non-international armed conflict; or an act of torture under Section 7.1.

The Special Panel is directed to apply treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict, but fails to mention that the *Furundzija* case in the ICTY decided the proposition that the rape of a single victim is a crime serious enough to warrant prosecution by an international war crimes tribunal. The defendant in that case was charged and convicted with rape and torture as war crimes.<sup>51</sup> How can this oversight be explained? One can only speculate that either the Panel or Prosecutor or both lacked sufficient knowledge of recent precedent in international criminal law,<sup>52</sup> or insufficient insight into the crime of rape.

Section 9 "Sexual offences" states that the provision of the applicable Penal Code in East Timor shall, *as appropriate*, apply. Given the context of armed conflict, forced displacement, violence and vulnerability in the refugee camps in West Timor, there is a strong case to say that the application of the Indonesian Penal Code was inappropriate in this case.

The lack of international criminal jurisprudence informing the Panel's decision identified here is not limited to the Kasa case. Suzannah Linton has argued cogently that the first two initial decisions handed down by the Special Panel in the cases of Joao and Julio Fernandes<sup>53</sup> should have been deal with as international crimes rather than violations of domestic law.<sup>54</sup>

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<sup>51</sup> *Prosecutor v. Anto Furundzija*, ICTY-95-17/1-T, Judgment 10 December 1998. See further above note 5, 322-3.

<sup>52</sup> Above note 47, 23-4, JSMP has raised concerns over the training and experience of both local and international public defenders in *The General Prosecutor of the United Nations Transitional Administration in East Timor v Joni Marques, Manuel Da Costa, Joao Da Costa alias Lemorai, Paulo Da Costa, Amelio Da Costa, Hilario Da Silva, Gonsalo Dos Santos, Alarico Fernandes, Mautersa Monis, Gilberto Fernandes and Syaful Anwar*. Dili District Court Special Panel for Serious Crimes Case no. 9/CG/2000, 11 December 2001. (*The Los Palos Case*)

<sup>53</sup> *General Prosecutor v Joao Fernandes*, Case No. 001/00.CG.2000 (25 January 2000); *General Prosecutor v Julio Fernandes*, Case No. 002/00C.G.2000 (1 March 2000)

<sup>54</sup> Above note 3, 414-458.



In that case, the authors of the Maliana POLRES Massacre were charged and subsequently convicted not with crimes against humanity but with murder. In an unreported dissenting judgment, the only Timorese judge, Maria Natercia Gusmao Perreira J questioned how the practice of prosecuting as a domestic crime “could bring justice to a people who had suffered so much during the many years of occupation”.<sup>55</sup>

The JSMP trial report of the first Serious Crimes Court convictions in the Los Palos case notes that “it is surprising that the Panel’s arguments seem not to be based on international jurisprudence”, noting that the Panel did not mention the *Tadic* case when assessing the elements of an armed conflict.<sup>56</sup>

Suzannah Linton has noted: “A state-of-the-art system for prosecuting international crimes has been grafted onto the fledgling criminal justice system of East Timor, drawing much from the regime designed for the proposed International Criminal Court.”<sup>57</sup> She notes elsewhere that one theory as to the poor resourcing and narrow decisions of the Court was that “the Serious Crimes venture exists simply to be used as political leverage in dealing with Indonesia.”<sup>58</sup>

As noted above, JSMP commented on the Kasa case that in the light of continued criminal acts against refugees in West Timor, this judgment would put more pressure on Indonesia to prosecute, and may also affect the operation of the Commission on Reception, Truth and Reconciliation.<sup>59</sup> In late June 2002, the Serious Crimes Investigations Unit charged two Indonesian officers and 14 militiamen with crimes against humanity for their alleged involvement in more than 70 killings and four rapes in East Timor’s Bobonaro and Oecussi districts in 1999. “This is a breakthrough case because it shows clearly that the killing of U.N. workers was part of a widespread and systematic attack, not only carried out by militiamen but also by serving members of the Indonesian military,” said prosecutor Brenda Sue Thornton.<sup>60</sup> However, only four East Timorese militiamen out of the 14 indicted Wednesday are in custody in East Timor. The rest, along with both Indonesian officers, are at large in Indonesia. These arrest warrants might also be designed to force Indonesia’s hand.

It should also be noted that the Serious Crimes Court has faced significant administrative and substantive difficulties until now, with only 2 convictions and 117 indictments.<sup>61</sup> A former senior staff member who resigned last year was quoted recently as saying that “There is no doubt, in my mind, that we were not properly funded because they [the UN] did not want results.”<sup>62</sup> The head of the Unit resigned last year and the new head, Norwegian prosecutor Siri

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<sup>55</sup>Ibid 422.

<sup>56</sup>Judicial System Monitoring Programme (JSMP) *A JSMP Trial Report The General Prosecutor v John Marques and 9 Others (The Los Palos Case)* 2002, 30.

<sup>57</sup>Above note 3, 418. See also the media and NGO critiques of the Serious Crimes Court Linton details in note 13 on page 418.

<sup>58</sup>Suzannah Linton, “*Cambodia, East Timor and Sierra Leone: Experiments in International Justice*” (2001) 12 *Criminal Law Forum* 185, 217. This article is a seminal piece on transitional justice issues in East Timor.

<sup>59</sup>Above note 47.

<sup>60</sup>Joanna Jolly, “Indonesians Charged With War Crimes” (AP) 26 June 2002.

<sup>61</sup>For descriptions of the difficulties in building the judicial system in East Timor, see Hansjörg Strohmeier “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor”. Symposium: State Reconstruction After Civil Conflict (2001) 95 *American Journal of International Law*, 46; and Suzannah Linton, “Rising from the ashes: the creation of a viable criminal justice system in East Timor” (2001) 25 *Melbourne University Law Review*.

<sup>62</sup>John Martinkus, “Beyond Justice”. *The Bulletin*, 11 June. 2002, 34.

Frigaard said during independence interviews that there will no international criminal tribunal and most of those indicted [before the Special Panels] will not turn up.<sup>63</sup> This is evidence of an extremely defeatist attitude to transitional justice issues in Timor by UNTAET.

On a positive note, at least the initial indictments that were prosecuted and brought to trial by the Serious Crimes Unit included sexual violence offences, unlike the ICTY and ICTR. This may be due to cooperation with the Vulnerable Persons Unit in CivPol and the Gender Affairs Unit.

### The Lolotoe trials

Previous cases such as the Kasa case will bear on the Lolotoe Crimes Against Humanity trials<sup>64</sup> currently before a Special Panel for Serious Crimes.

The three defendants in the Lolotoe case - KMP militia commanders José Cardoso Ferreira and João França da Silva and former Guda village chief Sabino Gouveia Leite - are accused of waging a campaign of deadly terror in the Lolotoe area of Bobonaro district during the months surrounding the 1999 Popular Consultation on the future of East Timor.

The two KMP commanders are accused of illegal imprisonment, murder, torture, rape, persecution and inhumane treatment of civilians in Lolotoe sub-district, near the border with West Timor, Indonesia. Gouveia Leite is accused of being an accomplice in the offences allegedly committed by the KMP and members of the Indonesian Armed Forces (TNI). An important aspect of the case is the maintenance by the accused of a "rape house" where three women suspected of being related to Falintil guerrillas were raped repeatedly from May to July 1999.

The Lolotoe case is the second of 10 priority cases to be tried by the Special Panels, and the first crimes against humanity case in East Timor to include charges of rape and charges against superiors based on the actions of their subordinates.<sup>65</sup>

This is a prime opportunity for the Special Panel to apply the jurisprudence of the *Akayesu* case in the ICTR and the *Kunerac* case in the ICTY where rape was determined to be a crime against humanity. The *Kunerac* case is based on a rape hotel fact situation in the town of Foca comparable to the Lolotoe "rape house" and also examines the issue of enslavement.<sup>66</sup>

### Conclusion: Transformation or Afterthought?

Hilary Charlesworth and Christine Chinkin conclude that precedents in prosecuting gender-based crime had broken the silence over these crimes but pointed to serious shortcomings still apparent in the system. A key limitation was the fact that international crimes are still required to be wide-spread and systematic, and that the sexual violence in the former Yugoslavia might

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<sup>63</sup>Ibid.

<sup>64</sup>*The General Prosecutor of the United Nations Transitional Administration in East Timor v Joao Franca Da Silva alias Jhoni Franca, Jose Cardoso Fereira alias Mouzinho and Sabino Gouvvia Leite*. Dili District Court Special Panel for Serious Crimes Case no. 4/CG/2000. (The Lolotoe Trial)

<sup>65</sup>UNTAET "Lolotoe Trial Begins Phase Of Hearing Witnesses," *Daily Briefing*, 7 May 2002.

<sup>66</sup>*Prosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23/1-T, 22 February 2001.

be seen as “exceptional.”<sup>67</sup> There has certainly been a failure to address the systematic nature of gender-based crime in West Timor in the Kasa case.

Charlesworth and Chinkin also point to an inadequacy of international legal remedies that provide long-term, financial and practical assistance.<sup>68</sup> They note that international law currently only emphasises women’s sexual and reproductive identities, and only harms inflicted by opposing forces.<sup>69</sup> Maria da Costa’s story is no doubt heavily influenced by her need to ensure her economic survival for herself and two children, not to mention a need for counselling and health services.

The hearing of the *Kasa* case can be argued to have made life even harder for both the alleged victim and women still in West Timor generally. Until this trial, there may have been at least some ambiguity over what accountability there might be for Indonesian military and East Timorese militia who commit crimes whilst in Indonesian territory against East Timorese. In the safe knowledge that Indonesia would probably not investigate let alone prosecute crimes in West Timor, this judgment sent a clear message of impunity for rape. After fatal attacks on UNHCR staff in West Timor in September 2000, most of the members of the international development community who may have been able to bear witness had left.

Meanwhile, media reports confirm that the “victims of militia rape and sex slavery continue to bear the scars of post-ballot violence in East Timor, facing ostracism on their return home.”<sup>70</sup> Abuelda Alves of Fokupers said of the women who are able to return home, often with babies who are the product of rape: “They are viewed as rubbish. Their families are embarrassed. Women who were already married, their husbands reject them.”<sup>71</sup>

Maria Dominggas Alves, also of Fokupers, captured a crucial feminist quandary of international criminal law: “Why is it that men who are tortured by the military forces are seen as heroes, whereas women who are tortured (including rape) are seen as traitors? Doesn’t this show there is a double standard for women?”<sup>72</sup>

It could get even worse for these women if broad amnesties are granted to militia in West Timor. A draft amnesty bill is currently before the new Parliament.<sup>73</sup> The new President Xanana Guasmo recently stated: “We must do our best to eradicate all sentiments of hatred, of revenge. If you still feel like this, then you are living with the ghosts of the past.”<sup>74</sup> Bishop Belo countered: “I hear the voices of widows, the complaints of raped women, of orphans. They don’t like to live together and meet in the street their perpetrators.”<sup>75</sup> These “ghosts of the past” might come back from West Timor to fill women’s lives with terror.

Taking a broad perspective of the four current transitional justice mechanisms in East Timor as outlined in my introduction, one can see a lurking danger that the view that the violence since

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<sup>67</sup>Above note 5, 333.

<sup>68</sup>Ibid.

<sup>69</sup>Above note 5, 334.

<sup>70</sup>Above note 21; Sian Powell, “East Timor’s children of the enemy” *The Weekend Australian* 10 March 2001, p.1.

<sup>71</sup>Ibid.

<sup>72</sup>Oxfam Community Aid Abroad (1999), May, “Women Fight for Freedom: The Struggle for Human Rights and Independence in East Timor.” <[www.caa.org.au/world/rights/reports/east\\_timor.html](http://www.caa.org.au/world/rights/reports/east_timor.html)>

<sup>73</sup>Draft Amnesty legislation (unofficial-translation) and JSMP’s comments on the draft legislation <<http://www.jsmp.minihub.org>>

<sup>74</sup>AP, “Revenge is low on the list of priorities” *The Weekend Australian*, May 18-19 2002, 15.

<sup>75</sup>Ibid.



1975 should be viewed as a civil war rather than an international armed conflict will be confirmed. In other words, the Indonesian, and Australian government line has been that the conflict was a “civil war between equally-matched Timorese factions, with Indonesian security forces as bystanders.”<sup>76</sup>

The paper has focused on the Serious Crimes Court but the case analysis feeds into the wider transitional justice dilemmas facing Timor. My contention is that the international community has created an unwieldy, illogical and potentially self-defeating system of transitional justice mechanisms. The worst-case scenarios include the following outcomes: that a broad amnesty is passed, East Timorese militia in West Timor return and the Truth Commission and its “reception” function are severely compromised. The Truth Commission is unable to deal with serious crimes excluding those granted an amnesty, but can investigate the full time period since 1975. The Serious Crimes Court can only deal with the period of 1999, will not extend its jurisdiction to West Timor and will end its mandate in 2003. The Indonesian ad hoc Human Rights Court will only prosecute crimes committed in a very limited time frame and has so far failed to convict any Indonesian military at all. What picture, what legal record of the conflict in East Timor might be presented to the future if these predicted scenarios come to pass?

The Commission for Reception, Truth and Reconciliation (CRTR) will have an important psycho-social role to play as the main Timorese attempt to form a truthful record of the events and take Timorese perpetrators and victims through a healing process at both a local and national level. It may well be proved that the CRTR model of restorative rather than retributive justice is most fulfilling to the women of East Timor.<sup>77</sup> However, the mechanism of a truth commission is a traditional response for a society that has experienced a civil, rather than an international conflict. Did East Timor choose it, and international donors fund it, because no other options were left? Do the Truth Commission and the amnesty debate feed into, rather than oppose, Indonesia’s civil conflict thesis?

At present, only the East Timorese militia still in East Timor (of lesser strategic importance to Indonesia by definition) have been both prosecuted and sentenced. The first sentence has already been served.<sup>78</sup> Can the international community afford to leave to history this skewed legal record of the events of 1999, let alone post 1975? In fact, the consequences of the Indonesian military “getting away with it” may be even more severe in the immediate future for those in Indonesia, especially in West Papua and Aceh, and face the international community again. What faith can civil society in either East Timor or Indonesia (or globally) put into the rule of law if that interpretation is left to stand by the United Nations?<sup>79</sup> Why should the women of East Timor or Indonesia put their trust in the law in the future?

The vanishing options left open to the international community and East Timor present serious and difficult ethical choices. It is hard to foresee a development that would improve the chances

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<sup>76</sup>Rowan Callick, “Timor trials set to downplay role of Indonesian military” *Australian Financial Review*, 8 May 2002, 18; above note 74.

<sup>77</sup>Charles Villa-Vicencio, “Why perpetrators should not always be prosecuted: Where the International Criminal Court and truth commissions meet.” (2000) 49 *Emory Law Journal*, 205.

<sup>78</sup>Judicial System Monitoring Programme, “First Serious crimes sentence served”, Dili, 1 July 2002.

<sup>79</sup>Above note 20. Note Bishop Belo’s comments: “To date there is no definitive account of the crimes committed by the Indonesian army and the militias during 1999. The UN investigations have not even been resourced sufficiently to be able to report on a few of the most serious incidents. As long as this continues the perpetrators continue to go free and are able to pursue their military careers unhindered. Prosecuting the crimes of 1999 is essential for East Timor, but also for Indonesia. Democracy there is fragile and the military continue to intrude on both government and civil society.” “To forge a future, Timor needs justice for the past”

for the women of East Timor to achieve the justice and compensation they have demanded so forcefully.

Unfortunately, I conclude that Charlesworth and Chinkin's general analysis, that international law is still unable to meet the needs of women, resonates strongly with the outcome of the Leonardus Kasa case for the survivor Maria da Costa and her two children, perhaps still three of the estimated 50,000 people in West Timor. The broad landscape of transitional justice for women in East Timor looks similarly bleak. The international community must not, however, give up the chance to finally tell the "untold story" of so many Timorese women.

A core priority must be a functional court and legal system within a range of broader social policy options, preferably an international tribunal. As Benjamin B. Ferencz, a former Nuremberg prosecutor has said on the advent of the ICC: "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."<sup>80</sup>

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<sup>80</sup> Benjamin B. Ferencz, a former Nuremberg prosecutor, quoted on [www.icrc.org](http://www.icrc.org).

# Researching Sensitive Topics

## *Investigations of the Sexual Abuse of Women in Uganda and Girls in Tanzania*



**Helen Liebling\***  
**Shilu Shah\***

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When investigating “sensitive” topics as researchers, we have a responsibility to conduct ethical research. However, in this article we argue that although important consideration should be given to cultural sensitivities, and the support and safety of all those involved when conducting such research, this should not be at the expense of continued silence surrounding the abuse of women and children. Over the last couple of years we have been researching the abuse of women during the civil war in Uganda<sup>1</sup> and the sexual abuse and exploitation of the girl-child in Tanzania as part of our on-going PhD research<sup>2</sup>. The observations and commentary in this article are based on these experiences. Firstly, we will look at definitions of a sensitive topic and outline their limitations. We will then briefly discuss some dilemmas involved in conducting sensitive research, especially in terms of issues relating to cultural sensitivity and the potential dangers for those being researched.

### Definitions of a Sensitive Topic

There are several definitions of what constitutes a sensitive topic. For instance, Sieber and Stanley define socially sensitive research as:

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<sup>1</sup> Musisi S, Kinyanda E, Liebling H, Kiziri-Mayengo R & Matovu P, The Short Term Intervention of the Psychological and Gynaecological Consequences of Armed Conflict in Luwero District (Uganda) Part 2, Uganda Isis-WICCE, 1999; Liebling H & Ojiambo-Ochieng R “The Psychological Consequences of War on Women in Uganda” paper presented at the International Society for the Study of Dissociation Conference in Salford, UK, 15-17<sup>th</sup> April 2000

<sup>2</sup> Shah S, research in progress, 2001



Studies in which there are potential consequences or implications, either directly for the participants in the research or for the class of individuals represented by the research.<sup>3</sup>

This definition is broad in scope and allows for the inclusion of topics that ordinarily may not be thought of as sensitive. In addition, it alerts researchers to their responsibilities to the wider society. However the term sensitive as defined by Sieber and Stanley is controversial because they do not specify the scope or nature of the consequences and implications of doing this type of research. Moreover, their definition tends to draw away from the more technical and methodological problems of conducting sensitive research. For example in research in Uganda, there was a need for Isis-WICCE<sup>4</sup>, a women's non-governmental organisation, to spend two years building up trust with the communities of the Luwero district before women 'spoke out' to researchers about their experiences of rape and torture during the civil war.<sup>5</sup> An alternative approach according to Renzetti and Lee is to start with the observation that sensitive topics are those that seem either threatening, or contain an element of risk in some way.<sup>6</sup> Hence, such research involves potential costs and consequent problems for both the participants and researchers. Moreover, Lee suggests that sensitive topics include areas which are private, stressful or sacred, or potentially expose stigmatising or incriminating information.<sup>7</sup> Researching abuse of women and children may do both of these things and therefore have the potential to cause pain and harm to individuals who are already experiencing oppression. Broadly speaking, research on sensitive topics has had contradictory outcomes. On one hand, difficulties associated with sensitive research have tended to inhibit adequate conceptualisation and measurement.<sup>8</sup> For instance, it is difficult to assess accurately the number of women who were raped during the Luwero civil war and the number of girls who are sexually abused and exploited in Tanzania, as many of them may not have been/or are unable to speak about their experiences due to fear and the cultural sensitivities which surround these issues. On the other hand, problems raised by sensitive topics have led to technical innovation and have contributed to methodological developments for example strategies for asking sensitive questions on surveys<sup>9</sup> and technical means for preserving the confidentiality of research data<sup>10</sup>. They have also given rise to a growing concern for human rights issues. Furthermore, by its very nature, research on sensitive topics, tends to reveal the limits of existing ethical theories as it sharpens the ethical dilemmas already present.

### Investigation of Sensitive Topics

Whilst investigating sensitive issues involving members of a given society, the choice of method for field research is often based on qualitative research methods such as participant

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<sup>3</sup> Sieber J & Stanley B "Ethical and Professional Dimensions of Socially Sensitive Research" (1988) 42 *American Psychologist* 49 at 49

<sup>4</sup> Isis-WICCE is Women's International Cross-Cultural Exchange, an international women's non-governmental organisation based in Kampala, Uganda.

<sup>5</sup> Musisi S, Kinyanda E, Liebling H, Kiziri-Mayengo R & Matovu P, *The Short Term Intervention of the Psychological and Gynaecological Consequences of Armed Conflict in Luwero District (Uganda) Part 2*, Uganda Isis-WICCE, 1999

<sup>6</sup> Renzetti CM & Lee RM, *Researching Sensitive Topics*, Sage Publications, London, 1993

<sup>7</sup> Note 6 at 4

<sup>8</sup> Herzberger SD, "The Cyclical Pattern of Child Abuse: A Study of Research Methodology", in Renzetti CM & Lee RM (eds) *Researching Sensitive Topics*, Sage Publications, London, 1993

<sup>9</sup> Bradburn NM & Sudman S, *Improving Interview Method and Questionnaire Design*, Jossey-Bass, San Francisco, 1979

<sup>10</sup> Boruch RF & Cecil JS, *Assuring the Confidentiality of Social Research Data*, University of Pennsylvania Press, Philadelphia, 1979

observation or in-depth interviewing. Such research methods however, require researchers to be ethical in their conduct, which in turn demands “cultural sensitivity”. Cultural sensitivity refers to the understanding and approaches that enable one to gain access to individuals in society, to learn about their lifestyles, and to communicate in ways that the individuals understand, believe, regard as relevant to themselves, and are likely to act upon. Sieber argues that:

Cultural sensitivity has nothing to do with the art and music of a culture, and almost everything to do with respect, shared decision making and effective communication. Too often, researchers ignore the values, the life-style and the cognitive and affective world of the subjects. They impose their own, perhaps in an attempt to reform people whose culture they would like to eradicate, or perhaps simply out of ignorance about the subjects reality.<sup>11</sup>

Thus in order to attain cultural sensitivities, it is imperative that any topic the research touches upon is couched in terms of the participants basic assumptions (not the researchers). Accordingly, the needs and fears of the participants, including their views, norms and values need to be understood and responded to in a constructive manner. Concerns about control, autonomy, and exploitation will always emerge in any research, which involves the attempt by one group to study or influence the characteristics of another group. Therefore, it is essential to establish a relationship between the researcher and the participants built on trust, respect, multilateral and shared decision-making, and equal-status. Similarly, it is also important that the researcher keeps in touch with all opinions circulating in the community in relation to the research. These may include views about the researchers motives and the risks or benefits of participating in the research. Nonetheless, grave difficulties arise when researching sensitive topics that have traditionally been marked off by strong, physical, symbolic and moral boundaries in any given society, as is the case of matters relating to sexual abuse in Uganda and Tanzania. Research into these areas has been strongly influenced and constrained by the fear of offending sensibilities by trespassing into restrictive domains. For instance, research into intra-familial sexual abuse of girls in Tanzania has been restrictive, owing to the cultural definitions stressing the intimate and personal character of family life.

Our own research findings so far reveal that the occurrence of rape of women in Uganda during the war and the sexual abuse and exploitation of girls in Tanzania is high.<sup>12</sup> Whilst conducting research in Uganda the levels of rape of women during the civil war was estimated to be between 50-70%<sup>13</sup> with the most common form of torture of women being sexual traumatisation at 58.3%<sup>14</sup>. During this later study, a 68-year-old woman told us she was raped during the Luwero conflict in front of her son and daughter-in-law. Her daughter-in-law was also raped. As she narrated her story she linked the rape to the death of her children claiming that because the action was in front of her child, this caused the death of others. She believed that she needed purification but had no money. The symbol of purification in her tribe was a white goat. The project was able to give her a white goat and in this way the woman felt that her future and family would be protected. This example illustrates the need for researchers and research projects carried out in this area to be very sensitively involved and responsive to their participants.

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<sup>11</sup> Sieber J, *Planning Ethically Responsible Research: A Guide for Students and Internal Review Boards*, Sage Publications, California, 1992 at 129

<sup>12</sup> Note 5 at 7; Note 2

<sup>13</sup> Lubanga R & Mwaka V, *Documenting Women's Experiences in Armed Conflict Situations in Uganda, 1980-1986 in Luwero District*, Uganda, Isis-WICCE, 1998

<sup>14</sup> Note 5 at 4

In Tanzania, research indicated that the sexual abuse and exploitation of the girl-child as a social problem has gained increasing recognition from both the civil society and government. Whilst it is difficult to know the exact extent and magnitude of the problem owing to the lack of any uniform or overall study in this area, independent projects and media reports suggest that between 1990–1994 2,432 girls had been raped and between 1990–1995 1,922 girls had been sexually molested.<sup>15</sup> It is important to note that these figures only involve those cases that had been officially reported. In terms of the commercial sexual exploitation of girls, the UNICEF study found that this practice was prevalent in several parts of the country.<sup>16</sup> The research in Tanzania has highlighted that the factors attributed to the high occurrence of the sexual abuse of girl-children, is linked to the construction of their sexuality. For example, the threat of contracting sexually transmitted diseases, especially AIDS, has caused some men to believe that if they have sexual intercourse with a young virgin they will be cured of such diseases and the HIV virus. Such misconceptions have led to the sexual exploitation of young girls and are based on the overall construction of female sexuality namely the purity of virgin girls. This is especially the case since sexually transmitted diseases are seen as women's diseases and therefore the cure can only be found in a virgin girl.

A case study in Uganda further illustrates issues around HIV/AIDS.<sup>17</sup> Devota bravely spoke out about her experiences during the Luwero civil war. She took up arms in 1983 to fight for freedom and peace. However, she was captured, and gang raped by a total of 21 soldiers which destroyed her reproductive organs. Devota also lost her husband during the war. However due to the traditional social construction of the Baganda tribe in Central Uganda that a married woman is the only "decent" woman in society, she had no option but to remarry and protect "her status." Devota was also the only person who could care for the rest of the family. During the research she spoke for the first time about her experiences and also discovered she had contracted HIV/AIDS. She died on 28<sup>th</sup> July 1999 at Mulago hospital, Kampala.

Whilst it is important to respect the cultural norms, values and traditions prevalent in Uganda and Tanzania, this should not be at the expense of the rights and safety of the women and children. It must be remembered that culture is often used as an excuse to disguise practices that continually oppress and violate women and children. Moreover, researching sensitive topics such as women's experiences of violence and rape during the civil war years in Uganda, and the sexual abuse and exploitation of the girl child in Tanzania, helps to expose the manipulative and invented elements of the culture. Similarly, we hope that our research extends existing knowledge on the abuse of women and children in Uganda and Tanzania, and further unveils areas of concern.

## Conclusion

This article of research in progress has briefly touched on some of the issues of defining and researching sensitive topics, with specific examples from fieldwork carried out in Uganda and Tanzania. It is important, as researchers working in this field that approaches to these issues continue to be discussed. Research in these areas sharpens the ethical dilemmas faced and reveals the limitations of existing theories. It is essential to understand, recognise, and exercise cultural sensitivities whilst conducting research involving members of any given society.

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<sup>15</sup> Mapunda, L. (May 25 1998) 'Sex Bill not Intended to Violate Men's Rights' *The Guardian (Tanzania)*.

<sup>16</sup> UNICEF *Children in Need of Special Protection Measures: A Tanzanian Study*, Dar es Salaam, UNICEF, 1999

<sup>17</sup> Isis-WICCE, *Impact*, 2, Kampala, Uganda, 1999; Isis-WICCE (2000), *Women, War and Trauma*, Kampala, Uganda, 2000 (video)



Notwithstanding, it is equally as important to remember that the abuse of women and children occurs across all cultures, classes and societies. Therefore, cultural sensitivities should not mar the need to conduct research on topics relating to the abuse of women and children that may have traditionally been restricted. Issues of confidentiality are extremely important and need to be carefully thought through as related to individual projects and the needs and contexts of those involved.<sup>18</sup> We should take care to consider all the ethical implications of our work. As Sieber and Stanley argue:

Sensitive research addresses some of society's pressing social issues and policy questions. Although ignoring the ethical issues in sensitive research is not a responsible approach to science, shying away from controversial topics, simply because they are controversial, is also an avoidance of responsibility.<sup>19</sup>

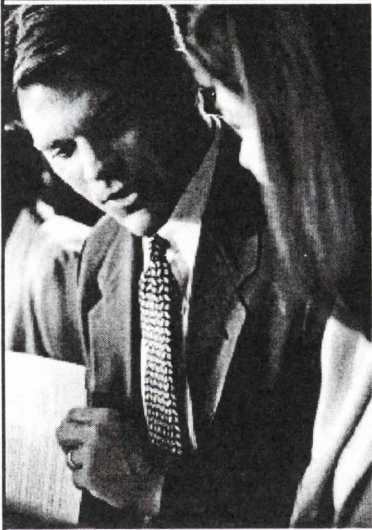
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<sup>18</sup> Jewkes R, Watts C, Abrahams N, Penn-Kekana L & Garcia-Moreno C, "Ethical and Methodological Issues in Conducting Research" (2000) 8 (15) *Reproductive Health Matters* 93

<sup>19</sup> Note 3 at 55

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# Book Review



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## **Women & the Law**

*Judicial attitudes as they Impact on Women*

Reviewed by Katarina Konkoly

*Women & the Law* is a collection of papers given at the 1993 conference of the same name. Written by judges, magistrates, lawyers, human rights activists and welfare workers, the papers call for justice & equality in all aspects of the Australian legal system. Over twenty articles review judicial attitudes as they affect the women that come before them as victims and offenders, and the women who work within law, including the judiciary and the wider legal profession.

The primary theme of *Women & the Law* is the need for judicial attitudes to be removed from legal isolation and exposed to the wider expectations of the community. Rather than enforce reform from the outside, the papers advocate an internal enlightenment of the system's potential to disadvantage women. Represented in a preparatory distillation of feminist legal theory, the potential for bias is examined as perpetrated (and perpetuated) by the judiciary and legislature. This is accomplished in an historical and contemporary context.

Articles range in depth from ingenuous summations of the legal system to sophisticated critiques of particular legal fields. An area laudably examined is the impact on women before the criminal courts, significantly as victims. The article by Therese McCarthy, "When victim/survivors of sexual assault are raped by 'reasonable men', and judged by legal 'reasoning'" is particularly disturbing to a reader's assumptions of justice and equality before the law.

An asset of this publication is its value as a time capsule. One may look back over gender equality issues pervading Australian law during the subsequent decade, and inquire, 'have things really changed'? According to the postscripts added before publication, they seem in many instances to have regressed. In other areas, such as judicial appointments, advance has been minimal. The lasting impression is, however, that although the need for change is now more widely known, the substantive implementation of reforms outlined in this book continue to be advocated

*Women and the Law* is edited by Anne Thacker, published in 1998 by Deakin University Press. It is available through Spinifex Press.



# Book Review



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## Gender and Environment

Reviewed by Zara Spencer

In the late 1970's, a decade after the birth of the Women's Movement, the collective voice turned to raise concern for the ecological status of the Earth. Continuing this theme into the new millennium *Gender and Environment* seeks to acquaint the reader with the affect of gender relations on the environment and the differential impact of the environment on the two genders.

The issues raised by *Gender and Environment* regarding the affinity between society and the environment are predominantly fourfold, namely: explanations of gender-environment relations; environmental problems and gender; differential capacity to affect the environment; and strategies for changing gender-environment relations.

Throughout the book examples were provided as to how the differing positions held by women affect the manner in which they experience environmental problems. The undeniable focus was on issues that unite women's experiences, such as child-bearing and domestic roles of women and their lower incomes. In this context the homogeneity of women was over-emphasised and the focal point, namely gender relations, over-simplified.

Whilst designed as an introductory text for undergraduate students undertaking environmental coursework, at times the balance between completeness and conciseness was not always appropriately struck, unfortunately at the expense of explanation and analysis. Despite this criticism the innovative inclusion of articles from the print media to complement the text availed itself to the stimulation of discourse and critical thinking. Self-directed learning and exploration of the issues raised, is also facilitated by the direction of the reader to a number of key texts at the end of each Chapter.

*Gender and Environment* provides a basic sketch and piques interest, not only engaging but challenging the reader to further their knowledge base and develop an understanding of this area.

*Gender and Environment* is authored by Susan Buckingham-Hatfield and was published in 2000 by Routledge Press.

# Book Review



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## Wild Politics<sup>1</sup>

Looking for a new way forward? Or a different explanation of what is currently happening? Susan Hawthorne challenges the universal endorsement of global western culture with her concept of biodiversity, arguing that biodiversity is a useful metaphor for understanding social, political, and economic relations in the globalised world of the twenty-first century. Creating powerful arguments for acknowledging Dominant Culture Stupidities and discussing the growth of worldwide protest movements, Dr Hawthorne dissects the attempts of transnationals to anaesthetise and appropriate the diversity matrix through legalese and for profit.

Offering an exiting ride into how the world could be, this challenging book is the one we have been waiting for. For a long time feminists have been saying we could do life differently, here is a local and global exploration.

Susan Hawthorne the author of *Wild Politics*, has been a political activist for thirty years. She is the author of a novel, *The Falling Woman*, a collection of poems, *Bird*, and (co-) editor of seven anthologies, including *CyberFeminism* (with Renate Klein). Her next book is *September 11, 2001: Feminist Perspectives*, with Bronwyn Winter. *Wild Politics* was first published in 2002 by Spinifex Press and is available through the aforementioned publisher.

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<sup>1</sup> This review has been reproduced with the permission of Spinifex Press

# Women and Climate Change

## *Why Women Will Drive Action on Climate Change*



**Kirsten Macey \***

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\* Cool Communities Facilitator, Queensland Conservation Council

Treat the earth well. It was not given to us by our parents: it was loaned to us by our children.<sup>1</sup>

Australia has the highest rate of greenhouse gas emissions per head in the world. Climate change is one of the most serious environmental threats to the planet, it is important that we take responsibility for reducing these emissions.

Climate change will have social, economic and ecological impacts for Australia. Continued reliance on fossil fuels will lead to increases in temperature; more extreme weather conditions such as floods, droughts, heatwaves and storms; rising sea-levels; reduction in winter snow cover; increased intensities of tropical cyclones and permanent damage to the Great Barrier Reef due to coral bleaching.<sup>2</sup> The challenge ahead of us is how we can prevent it.

All Australians are major contributors to greenhouse gases in their own homes. This article will examine the community development project Cool Communities, to identify how women are emerging as leading action on climate change at the household level.

Women and men contribute to maintaining environmental, economic and social sustainability in distinctive ways.<sup>3</sup> For women these contributions are made through:

- Their public roles as the majority of the workforce in the health, education, welfare and service industries;
- Their private roles as care-givers, farm managers, educators of children, and the principle purchasers of food and consumer goods; and
- The many public (paid) and private (unpaid) arenas where women have a major responsibility for the management of change and the transmission of social values.<sup>4</sup>

There exists a common struggle among women across the world to help the environment; as the environment that we live in and sustains us is under threat.<sup>5</sup> There are many inspiring examples from all over the world of women participating at all levels in protecting their environment. Internationally women such as the famous Chipko women of the Himalayas fought mining and logging to protect their forests, food, and their freedom. Many women social activists have led

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<sup>1</sup> Kenyan Proverb

<sup>2</sup> CSIRO, *Climate Change Impacts for Australia*, CSIRO, Australia, 2001

<sup>3</sup> Gough A, *Education and the Environment: Policy Trends and the Problems of Marginalisation*, The Australian Council for Educational Research, Melbourne, 1997

<sup>4</sup> Note 3

<sup>5</sup> Mies M & Shiva V, *Ecofeminism*, Spinifex, Melbourne, 1993

the campaign against the massive Narmada Dam in India, which will displace thousands of tribal people and flood the environment to supply drinking water and to produce electrical power.<sup>6</sup>

In Australia, there are examples of women who have led environment campaigns. Christine Milne, helped lead a campaign against a \$1 billion Wesley Vale pulp mill in Tasmania in 1989 and she went on to be leader of the Greens in the Tasmanian Parliament. Dr. Aila Keto of the Australian Rainforest Conservation Society has participated in a long battle for the cessation of logging in the Wet Tropical rainforest of Queensland. Yvonne Margarula and Jacqui Katona are two women who led the fight to prevent the Jabiluka uranium mine on Mirrar land in the Northern Territory.<sup>7</sup> Historically in Australia women have constituted a large proportion of the workers in the environment movement, whether that be volunteering or in paid positions. Everyday throughout the world, women take the lead in protecting their environment, whether by activism or example in their daily lives “never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.”<sup>8</sup>

There have been numerous writings on Women and the Environment, describing how women are linked more closely to nature and the environment because of their nurturing, caring, and reproductive roles. Whilst this article will not describe the theory behind women and nature literature, it describes how women are the key target audience for the Cool Communities project.

### Cool Communities<sup>9</sup>

Cool Communities is a community project intended to save thousands of tonnes of greenhouse gases every year. Home energy use is the household activity that contributes the most greenhouse gases. Twenty-two communities across Australia are devising new, exciting and more efficient ways of reducing greenhouse gases. Participating communities’ range from a VFL football club to a financial institution, a religious organisation to a food cooperative, a remote indigenous community to a timber and mining town and a Home Ideas Centre to a range of local government councils.

The Cool Communities project has selected women from the mid-twenties to the mid-fifties as the key target audience in working with householders to reduce greenhouse gases in the home. Women’s concern for their health and well being of their families and communities has provided a positive side effect for the protection of the environment. For whilst environment is not a major reason for women taking action, it has as a secondary result been positively influenced.

The National Women’s Consultative Council<sup>10</sup> held a forum in 1991 on women’s priorities for environmental action and found that “women are already making a significant contribution to the environment through the household (conserving, recycling and purchasing) and in the

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<sup>6</sup> Note 4

<sup>7</sup> Figgis P, “Taking Paradise and Putting Up Parking Lots: The Role of Women in Reclaiming the Environment” presented at the Anne Conlon Memorial Lecture, New South Wales, 1998

<sup>8</sup> Margaret Mead

<sup>9</sup> Cool Communities is a joint initiative of lead environment organisations in each state and territory and the Australian Greenhouse Office. For more information: [www.greenhouse.gov.au/coolcommunities](http://www.greenhouse.gov.au/coolcommunities)

<sup>10</sup> Commonly referred to as NWCC



workplace (in professional and service roles).<sup>11</sup> It also found that women were conscious of a need to conserve energy and discussed the difficulties of changing the behaviour of their families and community. Many women commented that the role of change agent regularly falls to women in their multiple roles in the workforce, as household managers and educators. Throughout these consultations women suggested incentives to encourage the use of energy efficient products such as long-lasting light bulbs or a 'green' refrigerator.<sup>12</sup>

Women are often the drivers for behaviour change that lead to reduction in greenhouse gases in the home. There are a number of reasons for this: women have high-levels of concern for the environment; women are 70% of grocery buyers; they are the household energy managers and they are the primary decision-makers on most household appliances.<sup>13</sup> "Environment issues are important and relevant in day-to-day activities as well as in the political arena".<sup>14</sup> Whilst, women are the main target audience for community development campaigns such as Cool Communities, men's roles in taking action on climate change are different.

Many Australians are already reducing the impacts of climate change in their homes. Changing the way we use energy requires changes in our behaviour. This can only be achieved if people choose to change themselves. Research conducted by the Cool Communities Project has found that a large majority of respondents were concerned about climate change, more women were concerned than men. A majority of respondents also believed that reducing our use of energy is the most effective and practical way of limiting global warming, this view was expressed much more strongly by women than by men.<sup>15</sup> This is about the choices each one of us makes in our daily lives.

People choose whether to install, purchase and use energy saving technologies. People choose whether to purchase a solar hot water heater or an electric one. People choose whether to vote for the governments that legislate for improved energy efficiency of homes and technologies. People choose whether to buy environmentally friendly products and services.<sup>16</sup>

People rarely have just one reason for making a decision to change behaviour – often there will be several that sit comfortably with their values in running their household, bringing up their children and putting into action their broader social views.

Community development projects targeting women must acknowledge the role women play and the barriers they have identified. The burden of preventing climate change must not rest with women alone. The Cool Communities project identifies women as a key target audience in taking action on climate change but acknowledges that both genders need to play a role. Similarly, whilst community action is necessary to prevent climate change, industry and government must also commit to taking action.

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<sup>11</sup> National Women's Consultative Council, *A Question of Balance: Australian Women's Priorities for Environmental Action*, National Women's Consultative Council, Canberra, 1991

<sup>12</sup> Note 10

<sup>13</sup> Cool Communities, *Cool Communities Communication*, Quay Communications, Australian Greenhouse Office, 2001

<sup>14</sup> National Women's Consultative Council, *A Question of Balance: Australian Women's Priorities for Environmental Action*, National Women's Consultative Council, Canberra, 1991

<sup>15</sup> Cool Communities, *Greenhouse Gases: Community Survey*, Essential Media Communications, Australian Greenhouse Office, 2002

<sup>16</sup> Shipworth M, *Motivating Home Energy Action: A Handbook of What Works*, Australian Greenhouse Office, 2000

All Australians can make a real difference to climate change by taking some simple actions at home to reduce their energy use. This means working as part of a community to create solutions to climate change. Cool Communities is about building a culture of greenhouse actions in Australia that will help move the greenhouse debate from one of uncertainty into one of action.



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# **Feminising Timorisation: Democracy & Gender in East Timor**

*How can we rethink democracy  
through a gendered lens?*



**Susan Gail Harris \***

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## Introduction

The United Nations Transitional Administration in East Timor (UNTAET) held Constituent Assembly elections in East Timor on 31 August 2001. The context, conduct and result of those elections provide an excellent case study for several pressing questions relating to the relationship between democracy and international law. The elections have strong implications for the development of customary international law and international precedent in this area, not least because of the central role played by the United Nations (UN).

This paper considers the Constituent Assembly elections through a “gendered lens”, and highlights the impact the electoral process had on the women of East Timor, their role in the self-determination of East Timor and their resulting participation in democracy. These insights will assist a feminist interpretation of the relationship between democracy and international law. There are several overarching questions which can be posed in the East Timor context. Did the behaviour of the international community towards East Timor tend to corroborate or negate the thesis that there is an emerging right to democratic governance? What form did democratic activity take under UNTAET? What was the role of East Timorese civil society? What was the role of development assistance in the choices made?

The focal event chosen is the debate preceding the election over whether there should be a provision in the electoral law setting out a 30% affirmative action quota for female candidates fielded by each party, in the form of UNTAET assistance for those parties who complied. East Timorese women advocates organised and enlisted the support of Xanana Gusmao, Jose Ramos Horta and Sergio Viera de Mello for these provisions. The UN Electoral Assistance Division in New York was reported to have refused “to set what they regard as a precedent for UN supervised elections in the future by allowing women's quotas to be a feature of the forthcoming

election in East Timor”, and threatened to “pull out of supervising the elections if the quotas are pursued.”<sup>1</sup> The National Consultative Council (NC), an advisory body appointed by UNTAET, voted down the reform. Women’s groups in Timor and some international NGOs then appealed to UN Secretary-General Kofi Annan to address the issue and initiate a change of policy.

### Definitions of the Right to Democratic Governance

The discussion of the role of international law in promoting democracy in Timor is deliberately framed by a feminist analysis of an election as a focal event. Susan Marks notes that the “democratic component of liberal democracy comes to revolve, principally, around elections” as a “particular method of producing governments”;<sup>2</sup> both on the grounds of pragmatism “dictated by what customary international law will support”, but also “embedded in the structure of their argument.”<sup>3</sup> Marks argues that: “Insomuch as elections stand at the narrative’s climax, democracy is made to appear to have nowhere further to go.”<sup>4</sup>

She contrasts this procedural view of free and fair elections “securing the acquiescence of citizens in their governance by others”,<sup>5</sup> with views expressed by other theorists that democracy encompasses a broader right to participate in decisions which affect the individual, civil society development, or the promotion of a wide range of human rights that impact on equality of participation in public life.<sup>6</sup> Her definition of democracy is outcome rather than process oriented – “the general concept or ideal of self-rule on a footing of equality among citizens.”<sup>7</sup>

By focusing down on this narrowest of definitions of democratic governance, that of a single election, monitored by the UN in a UN administered territory, major flaws in the liberal democratic conception of a democratic entitlement can be identified, and traced back to a lack of critical thought or interest in qualitative outcomes. Serious concerns with the electoral process were voiced by Timorese civil society, which go to the heart of Marks’ element of “self-rule”.

Charges made include concern that the elections were held far too quickly, without due preparation time, inadequate voter education and under too much influence from UNTAET. The quantifiable fact that it was a peaceful election with a high voter turn-out has completely obscured the qualitative fact that most Timorese did not understand that they were voting for representatives to help draft the Constitution, and that there was little or no attention placed on the ability of the Timorese to hold a free and fair election themselves once the UN withdrew. These complaints should be viewed in the context of an overall criticism of UNTAET that it failed to build the capacity of the local population to govern themselves, or in the commonly used short-hand in Timor, to assist the “Timorisation” of government.

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<sup>1</sup>C Scott, “East Timor Constituent Assembly Elections: Update on Campaign for Quotas for Women”, Catholic Institute for International Relations 24 Feb 2001.

<sup>2</sup>Susan Marks, “International Law, Democracy and the End of History” in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law*. Cambridge UP, 2000, 532-566, at 558.

<sup>3</sup>Ibid 559.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid 558.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid 553.



Another substantive charge is the impact of the elections on the hasty constitutional drafting process and the decision of the Constituent Assembly to transform itself into the Parliament on Independence Day in May this year, both of which actions have again been criticised by Timorese groups, on the grounds of lack of transparency in the process and a corresponding lack of legitimacy.

The most severe complaint about the elections, however, has come from women's groups. They point to three contentions, the first being that during the 1975 invasion up until the present day, women have suffered the most to achieve the self-determination of East Timor; secondly, that they have fought for independence in order to achieve their rights; and thirdly, that their contribution to achieving democracy should be recognised by their full participation in the new state. The decision of the UN Electoral Assistance Division in New York to oppose the idea of an affirmative action quota therefore was seen by some women's groups to negate their democratic and human rights to a type of self-rule, which acknowledged the female body-politic "self" of East Timor, and substantive rather than formal equality.

These issues go to the heart of Fox's contention that elections are not an end-point but an "essential first step" to a democratic society.<sup>8</sup> UNTAET seem to have operated under the assumption that East Timor should hold Constituent Assembly elections, Presidential elections and draft a Constitution, all within the two year period before UNTAET withdrew, presumably so its democratic legitimacy could be assured on 20 May 2002, Independence Day. In contrast, the widespread demand from the Timorese population for justice for international crimes committed by the Indonesian military and militia from 1975 to 1999 have been met with a lack of resources and little concrete success, as have a functional land title system and basic economic infrastructure.<sup>9</sup> What was the basis of UNTAET's assumption to focus on democratic process at the expense of other priorities? Was it based on an analysis of the competing rights and needs of East Timorese citizens, or instead on the uncritical liberal democratic assumptions of the UN itself and international donors?

### The Price of Democracy for East Timorese Women

Media around the world documented the price paid by the East Timorese population for independence. A popular consultation was held on 30 August 1999 where over 80% of East Timorese voted for independence from Indonesia. Militias, organised and supported by the Indonesian military, forcibly removed up to 250 000 Timorese into camps in West Timor and wreaked widespread and systematic violence on those perceived to be pro-independence supporters and their property.

The toll on Timorese women is less documented, in all areas of life, but particularly relating to sexual violence. Of the 1999 violence, Bishop Belo has written: "Up to 3,000 died in 1999, untold numbers of women were raped and 500,000 persons displaced - 100,000 are yet to return."<sup>10</sup> Sexual violence in the home remains a key priority for East Timor with frightening

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<sup>8</sup>Fox, G. "Panel: National Sovereignty Revisited; Perspectives on the Emerging Norm of Democracy in International Law" in *Proceedings of the American Society of International Law*, 1992, 270-1.

<sup>9</sup> See further Ajiza Magno's comments in Carnegie Council on Ethics and International Affairs, "Human Rights in Times of Conflict: Humanitarian Intervention: The Successes and Failures of UN Intervention in East Timor. Interview with Ajiza Magno." (2001) 2 (5) *Dialogue Human Rights*.

<sup>10</sup>Bishop Carlos Belo, "To forge a future, Timor needs justice for the past" *Sydney Morning Herald*, 28

levels of domestic violence reported in every District, although there have been some recent high profile court cases.<sup>11</sup> Female advocates state this is due to the fact that East Timor "...is a very traditional Catholic society which has been frozen by the years of war. The men are trying to reassert their authority."<sup>12</sup> Gender-based violence is a substantive and pressing issue in East Timor.

The obvious question arises - why has the issue of gender-based crimes experienced by East Timorese women been such a non-issue for the international community? What has this lack of attention and recognition meant for Timorese women in their quest for democratic participation?

The crucial connection is that women fought and suffered during this period not only to achieve nationhood, but to achieve a nation where they could participate in a democracy and claim their human rights:

Women have played a critical role in East Timor's struggle for national independence. Both inside the country and in the diaspora, they courageously challenged the Indonesian invasion and occupation, as well as the international support that made these possible. East Timorese women have survived Indonesian military campaigns of violence, including forced sterilization, rape and sexual slavery. They have shown themselves as leaders, though they are often pushed aside in political discussions. And women have continued to struggle for equality throughout the United Nation's administration of East Timor.

Unfortunately, women's liberation is not a natural outcome of national liberation."<sup>13</sup>

Two insights flow from this analysis. The first is that to seek the participation of women in democratic governance, we must look beyond the 1999 ballot and violence to assess the effect of the whole period of the Indonesian occupation. Hilary Charlesworth has noted that international law can be considered a "discipline of crisis" and notes: "One major silence is the position of women in the representation of crises. The players in international law crises are almost exclusively male... The lives of women are considered part of a crisis only when they are harmed in a way that is seen to demean the whole of their social group."<sup>14</sup>

Secondly, if you accept the proposition that the greatest suffering during the violence may have been borne by women, then according to the basic human rights principles of equality and non-discrimination by which UNTAET is bound, women should have a substantial input in what type of political participation and transitional justice solutions they require, and democratic processes should be designed to fit, not exclude the female experience.

Major issues for women presented at the Donor's Conference in 2001 included political transition, gender mainstreaming, an affirmative action policy aiming for 30% of women in the public service, health (especially counselling for victims of sexual violence and maternal

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August 2001. <<http://www.jsmp.minihub.org/Reports/Belo.htm>>

<sup>11</sup>Manuela Leong Peirera, "Domestic Violence: A Part of Women's Daily Lives in East Timor" (2001) 2 (5) *The La'o Hamutuk Bulletin*. <<http://www.pcug.org.au/~wildwood/violence.htm>>.

<sup>12</sup>O'Kane, M, "Return of the Revolutionaries" *The Guardian*, 5 January 2001.

<sup>13</sup>"Editorial: Women and the Reconstruction of East Timor" (2001) 2 (5) *La'o Hamutuk Bulletin* <<http://www.pcug.org.au/~wildwood/01augwomen.htm>>.

<sup>14</sup>Hilary Charlesworth, "International Law: A Discipline of Crisis." (2002) 65 *The Modern law Review* 377, 389.

health), 65% illiteracy rates amongst women, rural development and funding for civil society.<sup>15</sup>

Despite these constraints, the women of East Timor have been very articulate about their rights and political demands. During the six weeks of consultations, East Timorese women drafted a 10-point women's rights charter, which was presented to UNTAET on 16 August (see Appendix 1).

### UNTAET and "Timorisation"

In late 1999, the U.N. Security Council passed Resolution 1272, which established UNTAET. Indonesia turned power over to ten thousand U.N. troops, military observers, and U.N. civilian police, who established their headquarters in Dili, under the authority of Special Representative of the Secretary General, Sérgio Vieira de Mello from Brazil.

According to Resolution 1272 (1999), UNTAET had a mandate to "establish an effective administration", to "assist in the development of civil and social services", to "ensure coordination and delivery of development assistance" and most importantly for the purpose of this paper, to "support capacity building for self-government".

Regulation 1999/1 in November 1999 set out the parameters of the wide authority of the Transitional Administrator.

Section 1 states that in exercising all legislative and executive functions, the Transitional Administrator shall "consult and cooperate closely with representatives of the East Timorese people." Notably, Section 2 incorporates internationally recognized human rights standards into the job description of "all persons undertaking public duties or holding public office in East Timor", including the *Convention on the Elimination of All Forms of Discrimination Against Women* of 17 December 1979. The CEDAW Committee has set a minimum target of 30 per cent representation of women in decision-making positions.

To fulfil the general consultation requirement, the Special Representative set up first the 15-member mixed (Timorese and international staff) Consultative Council that functioned from December 1999 to July 2000, when it was substituted by a National Council (NC), an appointed body of 36 Timorese members, of whom 13 were women.

There have been many specific issues associated with a lack of civil society participation or due democratic process, such as the activities of the World Bank,<sup>16</sup> the adoption of the \$US dollar as the currency of East Timor<sup>17</sup> and the adoption of Portuguese as one of the official languages.<sup>18</sup>

The overall UNTAET relationship with the National Council and then the Constituent Assembly has been a key focus of civil society attention. Filomena Reis of the East Timor

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<sup>15</sup>Reis, F, *Statement to the Donors Conference for East Timor, Brussels 5-6 December* (2000) on behalf of REDE: Feto Timor Loro Sae Timorese Women's Network., <<http://www.pcug.org.au/~wildwood/DecWomen.htm>>.

<sup>16</sup>"Editorial: Democracy and the World Bank in East Timor." (2001) 4 *La'o Hamutuk Bulletin* <[La'o Hamutuk Bulletin: http://www.etan.org/lh/bulletin04.html](http://www.etan.org/lh/bulletin04.html)>

<sup>17</sup>"Editorial: Dollarization and Democracy." (2001) 2 (3) *La'o Hamutuk Bulletin* <[La'o Hamutuk Bulletin: http://www.etan.org/lh/bulletinv2n3.html](http://www.etan.org/lh/bulletinv2n3.html)>

<sup>18</sup>Dodd, M, "Timor fighting a war of words" *The Age*, 25 August 2001.

NGO Forum noted: "...the mistaken perception that there is no Timorese capacity or that there is capacity only amongst a few" and stated that "the convenience of talking with a limited elite can not justify jumping over and undermining the institutions being created with such difficulty."<sup>19</sup>

### The Quota Debate

On 16 March 2001, the Constituent Assembly Election Regulation of East Timor was promulgated (2001/2). Section 38 provided that there should be a set quota of women on parties' candidate lists as a condition for the parties to access UNTAET funding for their electoral activities. It was reported by international observers that the UN Electoral Assistance Division in New York had refused "to set what they regard as a precedent for UN supervised elections in the future by allowing women's quotas to be a feature of the forthcoming election in East Timor", and had also threatened to "pull out of supervising the elections if the quotas are pursued."<sup>20</sup> The reasoning for this decision is not found in the primary sources, but the comments stand in contradiction of both a UN Convention and the UNTAET mandate.

In the event, the provision was defeated by the National Council, by a coalition of male political leaders and young female councillors. Debate in the National Council ranging from the argument that such a measure would discriminate against men, that women lacked capability to hold office, to the view that quotas are tokenistic and imply lower quality of candidates. It was felt that small parties may not be able to fill this quota.<sup>21</sup> Avelino Coelho, the Socialist Party leader, said that the article in question was unacceptable for Council members, who could never support the "commercialisation" of women. He specified that if the quotas were linked to UN support, then the parties would be "more interested in receiving UNTAET support than in East Timorese women".<sup>22</sup>

Milena Pires responded to these arguments by saying that this provision was an incentive for parties to promote women and it avoided the UN imposing quotas on an elected body. She did agree that quotas alone were not enough to tackle women's lack of representation.<sup>23</sup>

Ciprianan Perreira, National Council representative of Fretilin, was reported at length in the Timor Post. She said that members of the National Council would not defend a group or an interest, but only human rights, and that she found the quota "discriminatory and negative. To put women candidate just to get financial support is to hold women in contempt. Such a bait is contempt for women."<sup>24</sup>

A group of several dozen protesters from East Timor's most prominent women's rights organisations demonstrated in front of the Government Palace in Dili after the vote had failed, carrying banners which read: "Who says women are not capable"; "There is no democracy

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<sup>19</sup>Above note 15.

<sup>20</sup>Above note 1.

<sup>21</sup>LUSA, *East Timor: National Council Members Explain Rejection of Quotas for Women*, 16 March 2001.

<sup>22</sup>Ibid.

<sup>23</sup>Tanaja, V, "EAST TIMOR: Debate over Constituent Assembly election process." *Green Left Weekly*, 14 March 2001 <<http://www.easttimorelections.org/news/2001/010314-glw.html>>

<sup>24</sup>"Cipriana: We defend at the national level" *Timor Post*, 17 March 2001.



when there is no respect”; “You know we are capable”; “National Council is not representative, dissolve it.”<sup>25</sup>

These women then demanded that the Transitional Administrator, Dr. Sergio de Mello, should not promulgate the law. He did so, however, stating that the law was considered to have gone through a “mature democratic process”.<sup>26</sup> De Mello then reintroduced the proposal in the form of a recommendation included in the electoral law’s preamble that gave double the air-time on TV during the campaign period to parties with thirty per cent of women as candidates. The extra air-time was also contingent on the party meeting the added criteria that fifty per cent of those women were in winnable positions on their party ticket. Only three of the 16 parties managed to meet both criteria, Fretilin, KOTA and the UDT, the oldest parties (see Appendix 2)

Sergio Vieira de Mello explained his position: “...the role of women here and the emancipation of women is I think a precondition for durable peace.”

I have never seen women play as negative, as destructive, as unhelpful a role as men have either as causes of the conflicts or in perpetuating conflicts or in the post conflict era in making conciliation as difficult as possible. That as a rule has been the privilege of men, and I can say that with some authority because I’m a man myself. Therefore when I say that here in particular, in East Timor, women are the most solid basis we can find for the new institutions we are creating, for the sustainability, for the consolidation, for in the medium and longer term, a peaceful and prosperous democracy in East Timor. I truly mean what I say. And perhaps the best proof that I may be right is that I don’t recall seeing one single female militia in 1999 killing, raping, burning and destroying.<sup>27</sup>

Campaigning began on 16 July 2001. The election results meant that Fretilin won 55 seats in the assembly, followed by the PD (Democratic Party) with seven and the PSD (Social Democratic Party) and ASDT (Timorese Social Democratic Association) with six each. Remaining seats were split among eight minor parties and one independent candidate. The new 88-seat Constituent Assembly has a total of 24 women members, or 26%. The full breakdown on female representatives gives the Fretilin party 17, the PSD three, the ASDT one and the PST and PNT one apiece. The party with the lowest female representation is the second-placed PD, which elected no women candidates (see Appendix 4).

One woman from Fretilin was elected as the District Representative for Dili, when Fretilin gained 12 out of the 13 District Representative seats. None of the three women standing as independent candidates was elected. Notably Fretilin’s manifesto contains a strong statement on women’s rights after targeted lobbying.

The purpose of the 2001 election was to elect representatives to draft the Constitution as noted. If women’s objectives as stated by the Women’s Charter of Rights are found in that document, then that may be a far better measure of impact than numbers of women as candidates or elected. The final Constitution document holds extremely strong statements about the equality of women and enshrines human rights. (see Appendix 2)

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<sup>25</sup> “Elimination Of 30% In Constituent Assembly. Women Protest. UNTAET Rejects” *Timor Post*, 17 March 2001.

<sup>26</sup> Ibid.

<sup>27</sup> ABC Radio National, Tooth, G. (Producer) “Jose Ramos Horta: Walk a Mile in My Shoes” 5 August 2001. <[http://www.abc.net.au/rn/talks/bbing/docs/20010805\\_horta.doc](http://www.abc.net.au/rn/talks/bbing/docs/20010805_horta.doc)>

## Evaluation of the Constituent Assembly Election

Gerald Tooth paints a vivid picture of the August 2001 election campaign:

Picture an election where the media has no real influence, an election where, if you want to take your message to the people, you have to fly to remote mountaintops, or drive for hours on treacherous roads and risk attacks from violent gangs. An election where if you're to have any chance of winning, you've got to have the blessing of the church. An election where voters are scared to go to the ballot box because the last time they did, they saw their houses go up in flames and blood flow in the streets.<sup>28</sup>

Timor's leading human rights NGO Yayasan HAK noted that this election was to prepare the first Constitution and serve as a framework for future elections, so its success should be measured not by a high turn-out or lack of violent incident alone, but by whether it served its special purpose. They note "this election has been portrayed as a model for democratic transition by UNTAET."<sup>29</sup> Therefore, the NGO judged the lack of Constitutional debate during the campaign as a weakness that went to the heart of the project: "The votes cast will reflect the choices of political parties or person to represent the electorate in the Constituent Assembly. However, they cannot be viewed as the voice of the people in the formation and adoption of the Constitution."<sup>30</sup>

These concerns were borne out by an Asia Foundation survey carried out by members of 21 NGOs, published in May, but carried out in February/March 2001. The survey of 1,558 Timorese in the districts revealed that while 94% wanted to vote, only 5% knew that the vote is to elect a Constituent Assembly; 35% did not know the date of the elections, and 16% did not even know there was going to be an election.<sup>31</sup> International NGOs confirmed that even on election day, many voters did not understand that the vote was to choose Constituent Assembly members and/or the function of the Constituent Assembly.<sup>32</sup>

Yayasan HAK also called for "democracy beyond the act of voting":

For hundreds of years, the East Timorese people have been excluded from democratic governance and control of their own affairs. This cannot simply be reversed by people exercising their rights to vote. Avenues for participation and an ability to have active input in the decision-making processes are vital to ensure that the East Timorese people have a voice in governance which they have been denied for so long.<sup>33</sup>

A summary of concerns with the election was that the timetable was unrealistic, that civic education started late because UNTAET initially failed to consult East Timorese on its design, that the Constitutional Commissions in each district had only 45 days to educate a

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<sup>28</sup>Ibid.

<sup>29</sup>Yayasan Hak, "East Timor: Elections in the Context of Nation-Building" (Press Release, 3 September 2001). < <http://www.radioproject.org/transcripts/0601.html> >

<sup>30</sup>Ibid.

<sup>31</sup>Asia Foundation, *East Timor; National Survey of Voter Knowledge (Preliminary Findings)* May 2000, 4.

<sup>32</sup>International Federation for East Timor (IFET) "Summary of Findings." *2001 Constituent Assembly Elections Observer Project*.

<sup>33</sup>Above note 29.

mostly illiterate public on complex constitutional issues and gather input, and that the political parties provided little information about their views on constitutional issues during the campaign. Capacity-building measures were seen as weak.<sup>34</sup>

A series of focus groups run by the National Democratic Institute for International Affairs found that the people of East Timor “have many well-developed ideas about democracy and the form of government they would like to see in their emerging nation. They seek proof that they are being heard and demand active participation in the development of this new nation. To ignore the demands of the East Timorese people will only add to the burden of their frustrations.”<sup>35</sup>

The focus groups found that those who knew of UNTAET’s National Council did not regard it as being a representative body,<sup>36</sup> and that East Timorese from the districts believe the existing political process is dominated by a Dili-based elite and that they have been left out of it.

It was also noted with concern by international election monitors that the structure of the Assembly, as well as the regulatory encouragement for it to evolve into East Timor’s first elected legislature, may pre-empt decisions on the structure of the legislature, as it was predicted that the elected members are unlikely to relinquish their positions to stand for another election.<sup>37</sup> This was, in fact, exactly what came to pass in May 2002.<sup>38</sup>

Finally, IFET noted that approximately one-tenth of the East Timorese population is excluded not only from registration and voting, but from the entire nation-building process, as approximately 80,000 East Timorese people were still trapped in refugee camps in West Timor.<sup>39</sup>

## Conclusion

As Xanana Gusmão has pointed out, many international officials have appeared slow to realise that “democracy is not something that is taught, but practiced”.<sup>40</sup> This slowness may be due to assumptions about liberal democratic institutions and international law which UN staff brought to bear on their mission to East Timor. It was

Charlesworth has given us an insight into international law as a “discipline of crisis” which can “silence” the lives of women.<sup>41</sup> This should and can be compared to Susan Mark’s conclusion that it is not self-evident that elections are democracy’s first step,<sup>42</sup> or that there is any necessary

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<sup>34</sup>Above note 32; East Timor Observatory, “Transition and the electoral process” 18 June 2001.

<<http://www.pcug.org.au/~wildwood/01junelectoral.htm>>

<sup>35</sup>The National Democratic Institute for International Affairs, “Timor Loro Sa’e is our nation” February 2001. <<http://www.ndi.org>>

<sup>36</sup>East Timor NGO Forum, “Meeting of the East Timorese NGO Forum with the UN Security Council Mission To East Timor” 13 November 2000.

<sup>37</sup>Above note 32.

<sup>38</sup>United Nations Transitional Administration in East Timor, “Assembly Votes To Transform Itself Into Legislature” *Daily Briefing*, 31 January 2002. .

<sup>39</sup> Above note 32.

<sup>40</sup>Above note 34.

<sup>41</sup>Above note 14, 389.

<sup>42</sup>Above note 2, 564.

order of events involved with democracy at all. She highlights that the linear thinking of “liberal millenarianism”,<sup>43</sup> as she terms it, makes some chosen priorities seem unavoidable, and “eclipses” further dimensions of democracy.<sup>44</sup> The silence around women’s attitudes to democratic participation in East Timor due to crisis mentality of the international community, and the eclipsing of the vital role of civil society and the qualitative Constitutional purpose of the August 2001 election are self-reinforcing and connected.

The contention from the Timorese case study is that international law and international institutions such as UNTAET should support a deeper, more qualitative definition of democracy. Thomas Carothers recommends in relation to democracy aid that the question to be asked is not “Does it produce democracy?” but instead “Does it contribute to democratisation and if so, in what ways?”<sup>45</sup> UNTAET and international actors have certainly achieved some progress in East Timor in the area of women’s political participation by freeing up some resources and leverage for the already dedicated and articulate women’s groups such as Fokupers. UNTAET has held an election. Whether the presence of the international community has deepened the East Timorese understanding of democracy, the content or existence of a right to democratic governance, and the role of international law itself is doubtful, but remains to be seen.

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<sup>43</sup>Ibid 538-9.

<sup>44</sup>Ibid 565.

<sup>45</sup>Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve*, Carnegie Endowment 1999, 155.



## **Appendix 1 : Women's Charter of Rights in East Timor**

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### **Article 1 Equality**

- 1.The Constitution must prohibit all forms of discrimination.
- 2.The State may implement positive measures to promote equality between men and women.
- 3.Men and women are guaranteed equality before the law.

### **Article 2 Right to Security of the Person**

- 1.The Constitution must protect women's right to live free from any form of violence.

### *Article 3 Political Rights*

The Constitution must guarantee equal rights of women in political activities and public life as follows:

- 1.The right to vote and be elected.
- 2.The right to participate in government policy decision-making.
- 3.The right to participate in organisations concerned with communal and national politics.

### *Article 4 Right to Health*

- 1.The Constitution must protect all people's right to basic health care of the same quality.
- 2.The State must provide reproductive health care for women.

### **Article 5 Right to Education.**

- 1.The Constitution must guarantee equal rights to formal and non-formal education for men and women.
- 2.Women must have equal opportunity to study, and have equal access to scholarship opportunities and literacy programmes.

### **Article 6 Social Rights**

- 1.The Constitution must guarantee the rights to livelihood, shelter, sanitation, electricity, water, transportation and communication, health and education.
- 2.Women must participate in development programmes at every level.
- 3.The right to social security in case of sickness, unemployment and incapacity to work.

### **Article 7 Labour Rights**

- 1.The Constitution must guarantee equal pay for equal work.
- 2.Women must have a right to maternity leave without loss of salary, job or position.
- 3.Women's health needs must be protected in the work place.
- 4.Women have the right to safe working conditions.
- 5.Dismissal must be prohibited in cases of pregnancy or maternity leave.

### **Article 8 Tradition and Women's Rights**

- 1.Equal rights to inheritance.
- 2.The Constitution must regulate the dowry system to prevent violence against women.
- 3.Women must be guaranteed participation in traditional decision-making processes.

### **Article 9 The Right to Freedom from Exploitation**

- 1.The Constitution should prohibit prostitution and slavery.

### **Article 10 Children's rights**

The Constitution must protect children's basic rights:

- 1.Rights to food, shelter and social services.
- 2.Right to be cared for by parents and family.
- 3.Right not to carry out work beyond the child's age capacity.

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## Appendix 2 : Extracts from the Constitution of the Republic of East Timor

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[<http://etan.org/etanpdf/pdf2/constfnen.pdf>](http://etan.org/etanpdf/pdf2/constfnen.pdf)

### **PREAMBLE**

#### **Section 6**

##### **(Objectives of the State)**

The fundamental objectives of the State shall:

j) To create, promote and guarantee the effective equality of opportunities between women and men.

### **GENERAL PRINCIPLES**

#### **Section 16**

##### **(Universality and Equality)**

1. All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.

2. No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.

#### **Section 17**

##### **(Equality between women and men)**

Women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life.

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### Appendix 3 : Table of women candidates in political parties in 2001 elections

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Source: Catholic Institute for International Relations, *Observer Mission - East Timor Constituent Assembly Election*, 30 August 2001.

[<http://www.ciir.org/content/advocacy/documents/ETmissionreport2001.doc>](http://www.ciir.org/content/advocacy/documents/ETmissionreport2001.doc)

Political party	Total number of candidates	Number of female candidates	Female candidates, percentage of total
PNT	60	29	48%
UDC/PDC	75	29	39%
Fretilin	75	26	35%
KOTA	75	24	32%
UDT	72	23	32%
PSD	75	21	28%
ASDT	75	21	28%
PDC	75	20	27%
PST	75	17	23%
PDM	55	14	25%
PPT	71	12	17%
PTT	33	9	28%
Apodeti	15	8	53%
PD	74	8	11%
PL	32	4	12%
Parentil	53	2	4%

▪ **Appendix 4 : Table of seats won by women per party in 2001 elections**

Source: UNIFEM, East Timor page, <<http://www.unifem-eseasia.org/easttimor/easttimor1.htm>> at 4 July 2002.

Party Seats	Seats Won	Percentage	Women Elected
FRETILIN	43	57.37	16
PD	7	8.72	0
PSD	6	8.18	3
ASDT	6	7.84	1
UDT	2	2.36	1
PNT	2	2.21	1
KOTA	2	2.13	0
PPT	2	2.01	0
PDC	2	1.98	0
PST	1	1.78	0
PL	1	1.1	0
UDC/PDC	1	0.66	0
<b>Totals</b>	<b>75</b>	<b>96.34</b>	<b>22</b>

# The Laws of Peace

for Richard de Bury

Bishop of Durham, born January 24, 1287

an extract from *The Law of Poetry*



**MTC Cronin \***

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\* MTC Cronin has had six books and one booklet of poetry published, the most recent being *My Lover's Back ~ 79 Love Poems*, (UQP, 2002). Her next book, *beautiful, unfinished ~ PARABLE/SONG/CANTO/POEM*, is forthcoming in 2003 through Salt Publishing (UK). She is currently teaching writing and working on her doctorate, *Poetry and Law: Discourses of the Social Heart*, at the University of Technology, Sydney, Australia

From books come forth  
the laws of peace,  
also war, and the dead  
as if they were alive.

The questions have been allowed to grow.  
A single one is fixed  
as the skyline and another is humanity  
waving a new antennae.  
The walls of the house  
are a bird's wing.  
They are ambitious with the nest,  
becoming it.  
The floors are a single floor  
with all beneath it, even walking,  
even life.  
Blue is here, the blue that precedes  
catastrophe, that comes after,  
capsizing death.

The cathedral falls like a petal  
to earth.  
Stone practises what  
can only be contradicted in words.

We are in the biggest bubble  
in the universe.  
When we draw a cake  
we draw the icing first.  
Love is in the outline we make.



# Too Close For Comfort?

## *Japan's Failure To Address The "Comfort Women" Issue*



**Michelle Butler \***

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### The "Comfort Women"

During the 1930s, with Japan's rapid expansion and colonization, and accelerating after the declarations of war in the early 1940s, the government of Japan forced tens of thousands of women into sexual slavery for the Imperial Army.<sup>1</sup> Estimates of women abused in this system range from 50 000 to 200 000, of which statisticians estimate that only thirty per cent survived World War II.<sup>2</sup> They were abducted or coerced from Asian countries such as Korea, the Philippines, China, the then Dutch East Indies, Burma, and Japan itself.<sup>3</sup> Euphemized as "comfort women" they were made to follow the troops onto the battlefields and were subject to repeated rape, sometimes as often as forty times per day. These atrocities only came to public attention in the early nineties, when aging and courageous survivors began to tell of the devastating repercussions of their enslavement, as well as their exclusion from justice.

This paper will explore the treatment of the comfort women by the Japanese and international legal systems. It will seek to analyse the types of reparations made subsequent to the war in both the domestic and international spheres as well as the difficulties currently preventing legal atonement. In doing so it will vigorously challenge the apparent failure on all fronts to properly acknowledge the continued injustices which the comfort women have endured.

### International Adjudication After WWII

Despite the international community's awareness of these sexual assaults throughout World War II ("the War"), insufficient steps were taken to terminate the occurrence of such atrocities or to punish the offenders both during and after the War.<sup>4</sup> Indeed, the war crimes tribunals, established to address the crimes committed by the European and Asian Axis powers, also failed to address or even acknowledge the issue.<sup>5</sup>

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<sup>1</sup> Lie J, 'The State as Pimp: Prostitution and the Patriarchal State in Japan in the 1940s' (1997) *Soc Q* 252 at 253, 255.

<sup>2</sup> Chunghee S, 'Human Rights And The 'Comfort Women'' (2000) 12(1) *Peace Review* 123 at 124.

<sup>3</sup> Prices for their service ranged depending upon the ethnicity of the victim with services of Chinese, Korean, and Japanese women cost 1.00 yen, 1.50 yen, and 2.0 yen, respectively; Fisher B, 'Japan's Postwar Compensation Litigation' (2000) 22 *Whittier Law Review* 35 at 43.

<sup>4</sup> Askin K, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* Nijhoff Publishers, Cambridge, 1997 at 163.

<sup>5</sup> Campanaro J, 'Women, War and International Law: The Historical Treatment of Gender-Based War Crimes' (2001) 89 *Geo Law Journal* 2557 at 2559-2560.

The International Military Tribunal for the Far East, constituted in 1946 for the "just and prompt trial and punishment of all major war criminals" in the region did not enumerate rape as a prosecutable violation in its Charter.<sup>6</sup> Rape was, however, included amongst other crimes charged in the indictments.<sup>7</sup> Yet, in spite of its jurisdiction to do so, there was never a prosecution in relation to the rape of Asian women in the comfort system.<sup>8</sup>

### Recent Scrutiny

The injustices of the post-War tribunals were compounded by the subsequent half a century of silence. The issue was not raised again until 1990 when selected comfort women publicized their stories. Despite the filing of lawsuits by Korean, Filipino and Chinese survivors in 1991, 1993 and 1995,<sup>9</sup> the Japanese government continued to deny legal responsibility and refused to define their admitted "coercive" acts as war crimes, release specific information or address the reparations issue.<sup>10</sup>

By this time the international community had become interested in the issue. In 1994, the International Commission of Jurists, a non-governmental Geneva organization with consultative status at the UN, recommended that pursuant to its breaches of human rights, the Japanese government pay, "as a purely interim measure, US\$40,000 to each surviving comfort woman victim".<sup>11</sup> Likewise, in 1996 a report for the UN Human Rights Committee characterized the comfort women as 'sex slaves' and their treatment as a 'crime against humanity'. The UN Human Rights Committee called upon Japan to compensate victims, punish those responsible, without regard to limitation of time, and to ensure that educational curricula include the historical facts.<sup>12</sup>

In response to this growing international pressure, the Japanese government decided to attend to the compensation issue at a non-governmental level. By December 1994, the government had drawn up a compensation plan, the 'Asian Women's Fund', which would raise donations of private funds to pay a lump sum to each survivor.<sup>13</sup> According to the plan, the money collected would be used to provide medical and welfare services for the former comfort women. Although the Fund was government established, it is a private fund, and hence avoids acknowledgement of legal responsibility.<sup>14</sup> Indeed, many of the women have refused to accept the donations as they perceive

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<sup>6</sup> *Charter of the International Military Tribunal for the Far East*, 19 January 1946, TIAS No 1589 [hereinafter *IMTFE Charter*].

<sup>7</sup> Note 4 at 180.

<sup>8</sup> This injustice is further magnified by the fact that the Dutch Military Tribunal, also installed by the Allied Forces, vigorously prosecuted the Japanese officers responsible for the forceful conscription of thirty-five Dutch women in Indonesia who were used as comfort women. Copelon R, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217 at para 6.

<sup>9</sup> Watanabe T, 'Japan Admits that WWII Sex Slaves Were Coerced, Apology: Government Statement Overturns Decades of Denial; Yet the Question of Redress for Victims Remains' (1993) 5 August 1993, *LA Times* A1.

<sup>10</sup> Tongsuthi J, 'Comfort Women of World War II' (1994) 4 *UCLA Women's Law Journal* 413 at 415.

<sup>11</sup> Dolgopoul U & Paranjape S, *Comfort Women, an Unfinished Ordeal: Report of a Mission*, International Commission of Jurists, Geneva, 1994.

<sup>12</sup> McCormack G, 'Japan's Uncomfortable Past' (1998) 48(5) *History Today* 5 at 5.

<sup>13</sup> Chunghee S, 'The Korean Comfort Women: Movement for Redress' (1996) 36 *Asian Survey* 1226 at 1237.

<sup>14</sup> Iida M, 'Sex-slave Fund Launched After Hasty Compromise: Imperfect Atonement 'Better Than None,' (1995) 4 July 1995, *Politics and Society* 4 at 4.

the key issue not as compensation, but a formal recognition and apology by the Japanese government for its wartime atrocities.<sup>15</sup>

### Lawsuits in Japan

To date comfort women have met with extremely limited success in domestic lawsuits in Japan. In different cases Japanese courts have denied relief to comfort women plaintiffs owing to the expiration of the statute of limitations for the action<sup>16</sup>, or because the women have no legal right as individuals to seek compensation from Japan under international law.<sup>17</sup>

Most recently, in March 2001, the Hiroshima High Court overturned the only compensation award ever made to World War II comfort women.<sup>18</sup> The overruled District Court decision had been based on the principle that the Diet had failed to legislate a necessary law protecting human rights, ordering 300,000 yen as compensation to each plaintiff.<sup>19</sup>

The presiding judge, in the Hiroshima High Court, Toshiaki Kawanami held that abducting the women to use them as forced labourers and sex slaves did not constitute a serious constitutional violation that could be enforced by the judiciary.<sup>20</sup> He upheld the ruling of the District Court which had found that the provisions of the 1946 Constitution declaring that Japan has the "duty of a moral state" and assuring the "right to live in peace" did not imply rights to an official apology or monetary compensation.<sup>21</sup> These duties and rights applied to the legislature, not the courts, and were only ideals or goals, not enforceable rights.<sup>22</sup> Both courts also rejected the plaintiffs' alternative claim under the Meiji Constitution as they refused to give it retroactive effect.<sup>23</sup>

### Analysis of Current Position of Japanese Government

In most ongoing postwar compensation claims filed against Japan by former victims of wartime aggression, Tokyo has sought to invalidate their claims by asserting one or more of the following arguments<sup>24</sup>:

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<sup>15</sup> Hirakawa N, 'The World Won't Let Japan Forget' (1994) 27 August 1994, *Japan Times* 6.

<sup>16</sup> Scanlon C, 'Sex slave loses compensation bid' 30 November 2000 online: *BBC News* at [http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1048000/1048340.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1048000/1048340.stm) (date accessed 5 December 2001); 'No compensation for Japan sex slaves' 6 December 2001 online: *BBC News* at [http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1057000/1057360.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1057000/1057360.stm) (date accessed 6 December 2001).

<sup>17</sup> 'Court rejects Korean wartime claim' 26 March 2001 online: *BBC News* at [http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1243000/1243087.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1243000/1243087.stm) (date accessed 6 December 2001).

<sup>18</sup> *Ha Sun-nyo v. Japan*, 1642 Hanrei Jiho 24 (Yamaguchi Prefectural Court, 27 April 1998) translated in part in Okada T, 'The "Comfort Women" Case: Judgment of April 27 1998, Yamaguchi Prefectural Court, Shimonoseki Branch, Japan' (1998) 8 *Pacific Rim Law & Policy Journal* 63.

<sup>19</sup> The court finally found a cause of action in tort based on the failure of the Japanese state to enact a compensation law for victims of aggression by the Imperial Japanese Army; Totsuka E, 'Commentary On A Victory For "Comfort Women": Japan's Judicial Recognition Of Military Sexual Slavery' (1999) 8 *Pacific Rim Law & Policy Journal* 47 at 56.

<sup>20</sup> 'Japan overturns sex slave ruling' 29 March 2001 online: *BBC News* at [http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1249000/1249236.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1249000/1249236.stm) (date accessed 5 December 2001).

<sup>21</sup> Note 18 at 65.

<sup>22</sup> Note 3 at 45.

<sup>23</sup> Note 3 at 45.

<sup>24</sup> Boling D, 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility' (1995) 32 *Columbia Journal of Transnational Law* 541 at 552-553.

- a) Recent developments or advances in international criminal law may not be applied retroactively;
- b) Describing the system of "comfort stations" and use of "Comfort Women" as slavery is not accurate and, in any event, the crime of slavery was not forbidden by an established customary norm of international law at the time of the War;
- c) Acts of rape committed in armed conflict were not prohibited by customary norms of international law of the time, nor by the Regulations annexed to the Hague Convention No. IV of 1907;
- d) The laws of war only apply to nationals of a belligerent state and therefore cannot cover the actions of the Japanese military with respect to Korean nationals, since Korea was annexed to Japan during the War;<sup>25</sup>
- e) Individual "Comfort Women" have no right to compensation, as any potential individual claims were fully satisfied by the San Francisco peace treaty, which concluded the War, and by other bilateral agreements between Japan and other Asian countries;
- f) Any civil or criminal claims by "Comfort Women" are now barred by the applicable statute of limitations; and
- g) Individuals cannot bring claims under international law in Japanese domestic courts.<sup>26</sup>

These arguments are problematic for a multitude of reasons. Each will be dealt with in turn.

#### *A) Retroactivity Of International Criminal Law*

Indeed, in terms of the traffic of women and children, there is no need for international criminal law to be retroactively applied. Japan ratified the International Convention for the Suppression of the Traffic in Women and Children in 1925.<sup>27</sup> The Japanese military's recruitment of comfort women from occupied territories, not annexed to Japan would appear to be a clear violation of the Suppression Convention.<sup>28</sup> Additionally, its failure to prosecute these human rights violations by destroying documents relating to comfort stations in an effort to cover up their existence, and its subsequent failure to investigate until forced by international pressure forty-seven years later, could also be construed as a breach of the Convention.<sup>29</sup>

#### *B) & C) Slavery & Rape Not Against Customary International Law During WWII Nor Hague Convention Regulations*

Multilateral agreements provide evidence that customary international law before and during World War II prohibited Japan's scheme of forced prostitution. The 1904 International Agreement for the Suppression of the "White Slave Traffic"<sup>30</sup> required its signatory states to prohibit the trafficking of women, while the 1926 Slavery Convention<sup>31</sup> prohibited the practice of slavery by party states. Although Japan was not a party to either agreement, these treaties infer the existence of general principles and state practice condemning sexual slavery that may have acquired the force of custom

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<sup>25</sup> UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, 46th Session, Agenda Item 16, UN Document E/CN.4/Sub.2/1994/33 at 4 [hereinafter *Slavery Report*].

<sup>26</sup> Totsuka E, 'Commentary on a victory for "comfort women": Japan's judicial recognition of military sexual slavery' (1999) 8 *Pacific Rim Law & Policy Journal* 47 at 53.

<sup>27</sup> *International Convention for Suppression of the Traffic in Women and Children*, 31 March 1922, 9 LNTS 417 [hereinafter *Suppression Convention*] article 3 at 423, 425.

<sup>28</sup> Yu T, 'Recent Developments: Reparations for Former Comfort Women of World War II' (1995) 36 *Harvard International Law Journal* 528.

<sup>29</sup> 'Comment: State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law (1990) 78 *Cal Law Review* 449.

<sup>30</sup> *International Agreement for the Suppression of the "White Slave Traffic"* 18 March 1904, 1 LNTS 83 [hereinafter *White Slave Traffic Agreement*].

<sup>31</sup> *Slavery Convention*, 25 September 1926, 60 LNTS 253 [hereinafter *Slavery Convention*].



before World War II.<sup>32</sup> Further, the Laws and Customs of War on Land (Hague, IV) Convention of 1907,<sup>33</sup> which, by 1939, was "recognized by all civilized nations" includes provisions protecting family honor and rights, and the lives of persons.<sup>34</sup> Japanese deployment of comfort women against their will clearly violated such principles.<sup>35</sup>

*D) The Laws Of War Do Not Apply To Koreans As Korea Annexed To Japan During WWII*

Under Article 14 of the Suppression Convention, colonial powers reserved the right to exclude their colonies from its scope.<sup>36</sup> However, Japan's interpretation of this article as excluding liability for Korea, because of its annexure to Japan at the time, is inconsistent with the fundamental purpose of that article,<sup>37</sup> as it creates colonial "safe harbours" for the sexual slave trade, which violates the spirit of the Convention.<sup>38</sup>

*E) Individual Claims Fully Satisfied By Post-War Bilateral Agreements*

Although the San Francisco Treaty was concluded to settle World War II claims, article 14(a) of the Treaty explicitly provides that Japan may be required to pay further reparations in the future.<sup>39</sup> This clause should be interpreted to allow victims to raise new claims against Japan, especially since the particular claims at issue remained undiscovered until recently.<sup>40</sup>

Many of the other bilateral treaties, such as the Settlement Agreement, state that Japan is to be released from its reparation obligations.<sup>41</sup> However, the gross violations of human rights committed against comfort women surfaced after the conclusion of the bilateral treaties, which should be considered a substantially new factual situation not covered by the agreements. Under the customary law doctrine of *rebus sic stantibus*, the emergence of new facts or situations may undermine the necessary foundation for approval of the bilateral treaties.<sup>42</sup> Also, the main purpose of the Settlement Agreement, in particular, was to resolve the property claims stemming from World War II, and as such, does not intend to cover violations of individual rights.<sup>43</sup> Thus, the Settlement Agreement should be regarded as a limited resolution of issues relevant to economic co-operation, and not as a complete resolution of all World War II claims.<sup>44</sup> Finally, interpreting the bilateral treaties to bar the individual claims of former comfort women violates *jus cogens*, a norm of

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<sup>32</sup> Baxter R, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 *Brit YB International Law* 275.

<sup>33</sup> *Laws and Customs of War on Land (Hague, IV) Convention*, 18 October 1907, 36 Stat at 2277 [hereinafter *The Hague Convention*].

<sup>34</sup> Note 33 at annex section III, article 46, 36 Stat at 2290.

<sup>35</sup> Note 28.

<sup>36</sup> Note 27 at 427.

<sup>37</sup> Hsu Y, 'Comfort Women' from Korea: Japan's World War II Sex Slaves and the Legitimacy of Their Claims for Reparations' (1993) 2 *Pacific Rim Law and Policy Journal* 97 at 108.

<sup>38</sup> Note 28.

<sup>39</sup> *Treaty of Peace with Japan*, 8 September 1951, 3 UST 3169, 136 UNTS 46 at Article 14(a) 60-62 [hereinafter *San Francisco Treaty*].

<sup>40</sup> Note 28.

<sup>41</sup> *Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation*, 22 June 1965, Japan-Korea, 583 UNTS 258 [hereinafter *Settlement Agreement*]; *Reparations Agreement*, 9 May 1956, Philippines-Japan, 285 UNTS 3 article II, paragraph 1 at 260 [hereinafter *Reparations Agreement*].

<sup>42</sup> Note 28 at 153: "An international agreement is subject to the implied condition that a substantial change . . . in a state of facts existing at the time when the agreement became effective, suspends, or terminates . . . the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances."

<sup>43</sup> Oda S, 'The Normalization of Relations between Japan and the Republic of Korea' (1967) 61 *American Journal of International Law* 35 at 45-46.

<sup>44</sup> Note 37 at 105.

international law which would invalidate any agreement purporting to preclude individual human rights claims.<sup>45</sup>

#### *F) Civil Or Criminal Claims Now Barred By Statute Of Limitations*

In Japan, the statute of limitations extinguishes civil claims after twenty years from the date of the cause of action arising.<sup>46</sup> Thus, under Japanese law the legal claims for redress by former comfort women have long since expired.<sup>47</sup> However, under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>48</sup> international law precludes a time bar for severe violations of human rights. As such, the Japanese legislature could adopt legislation, similar to that of Germany, suspending the time bar for claims arising from war crimes or crimes against humanity committed during World War II.<sup>49</sup>

#### *G) Individual Claims Under International Law*

Modern international law recognizes individuals as subjects of international law for the purposes of domestic tribunals, particularly in the area of human rights.<sup>50</sup> This view was also prevalent before World War II<sup>51</sup> and was recognized in international conventions such as the Hague Convention, and in international legal opinions such as the *Chorzow Factory case*.<sup>52</sup> The recognition of crimes against humanity by the Military Tribunal for the Far East<sup>53</sup> also implies that international humanitarian law conferred a right to seek remedies on individuals during World War II.<sup>54</sup> As such, Japan's position that individuals cannot bring claims in Japanese domestic courts under international law principles is misguided as international jurisprudence and custom clearly contradicts such a view.

### **Inadequacy of Judicial Remedies – Need for Other Action**

Furthermore, a full resolution of the comfort women issue may require supplemental executive or legislative action. The plaintiffs in the recent litigation seek numerous remedies in addition to monetary compensation, including Japan's acknowledgment of its moral and legal culpability, a formal apology, full disclosure of all facts, and accurate revision of Japanese history textbooks to reflect Japan's conduct during World War II.<sup>55</sup> The Japanese judicial system alone may be unable to provide adequate remedies to the plaintiffs as these reparations are not within the scope of judicial powers. As such, the value of the lawsuits may ultimately be limited to increasing public interest in the issue and partially restoring peace of mind to the victims.

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<sup>45</sup> *The Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331, part V, section 1, article 53 at 344 [hereinafter *Vienna Convention*] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law"; part V, section 1, article 64, 1155 UNTS at 347 "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

<sup>46</sup> Parker K & Chew J, 'Compensation for Japan's World War II War-Rape Victims' (1994) 17 *Hastings International & Comparative Law Review* 497 at 539.

<sup>47</sup> Note 28.

<sup>48</sup> *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 UNTS 73 [hereinafter *Statutory Limitations Convention*].

<sup>49</sup> Note 28.

<sup>50</sup> Lauterpacht H, *International Law & Human Rights*, Garland Publishers, New York, 1973 at 9, 69-70.

<sup>51</sup> Note 11 at 174-78.

<sup>52</sup> *Factory at Chorzow Case (Germany v Poland)*, 13 September 1928, PCIJ series A, number 17 at 27-28.

<sup>53</sup> Note 6 at 28 article 5(c).

<sup>54</sup> Note 28; note 50 at 36.

<sup>55</sup> Note 10 at 416.

## Options Under International Law

Given the difficulty of a successful domestic lawsuit within their lifetimes, the comfort women are left with few alternatives. Some of the methods listed in Article 33 of the UN Charter for the settlement of disputes between States include arbitration and judicial settlement.<sup>56</sup> The feasibility of such arrangements will now be explored.

### Arbitration

One alternative which the comfort women have been unsuccessfully seeking is arbitration.<sup>57</sup> A Korean comfort women's group, the Korean Council, announced in July 1994 that it would file a complaint with the Permanent Court of Arbitration in The Hague to clarify whether Japan is obliged to compensate individual comfort women.<sup>58</sup> This course of settlement was recommended by the UN Working Group on Contemporary Forms of Slavery in its report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>59</sup> The Permanent Court of Arbitration, however, requires agreement by both parties and the Japanese government formally rejected this demand in 1995.<sup>60</sup>

### Judicial Settlement

The other alternative is to bring the suit before the International Court of Justice.<sup>61</sup> The Korean comfort women face a difficult task in bringing Japan before an international tribunal. According to international law an individual may not bring a case against another country to an international court.<sup>62</sup> Therefore, in order to sue the Japanese government in an international forum, the governments of the comfort women must initiate the action. This depends on state support for the comfort women, which owing to the various countries' dependence on Japan for aid and investment, may be lacking.<sup>63</sup>

### Korea

Korea is likely to be unwilling to bring a lawsuit against Japan as if it were to lose the case, its fishing rights in the Japan Sea or the ownership of the island of Takeshima could be jeopardized.<sup>64</sup> Such a scenario would be disastrous for economic and political stability in Korea.

### Taiwan & China

Both Taiwan and China announced decades ago that they would waive Japanese war reparations, a fact that may inhibit them from supporting demands for compensation.<sup>65</sup> Further, as an instance of the Chinese government's lack of support for Chinese comfort women, the Chinese Government kept Tong Zeng, a scholar who had compiled incriminating case studies on Chinese comfort women,

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<sup>56</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 Number 7 at article 33 [hereinafter *UN Charter*].

<sup>57</sup> Watanabe K, ' Militarism, Colonialism, and the Trafficking of Women: Comfort Women Forced into Sexual Labor for Japanese Soldiers' (1994) October - December, *Bulletin of Concerned Asian Scholars* 11 at 11.

<sup>58</sup> Tree T, 'International Law: A Solution Or A Hindrance Towards Resolving The Asian Comfort Women Controversy?' (2000/2001) 5 *UCLA Journal of International Law & Foreign Affairs* 461 at 477.

<sup>59</sup> Note 25.

<sup>60</sup> Note 57.

<sup>61</sup> *Statute of the ICJ*, online: International Court <http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm> (date accessed 28 November 2001) at article 1 [hereinafter *ICJ Statute*].

<sup>62</sup> Note 61 at article 34.

<sup>63</sup> Hicks G, 'Ghosts gathering: Comfort Women issue haunts Tokyo as pressure mounts' (1993) 156 (7) *Far Eastern Economic Review* 32 at 33.

<sup>64</sup> Note 58 at 479.

<sup>65</sup> Note 63 at 34.

out of Peking during a visit by Emperor Akihito in the early 1990s, to prevent any embarrassing incidents.<sup>66</sup>

### Indonesia

The Indonesian Government, has not pursued the issue despite documentary evidence confirming the existence of twenty-nine comfort stations utilizing Indonesian women during the war. This may be due to the fact that as yet, no former comfort women in Indonesia have come forward to demand compensation.<sup>67</sup>

### Other Problems with the ICJ

The jurisdiction of the ICJ and Permanent Court of Arbitration is based upon state consent<sup>68</sup> and it is unlikely that Japan would consent to the Court's jurisdiction.<sup>69</sup> Moreover, Japan has a reservation to its ratification of the ICJ stating that at no time would Japan be held liable for any actions which arose before the time of the Charter's ratification. Since the ICJ Charter was ratified by Japan after World War II, the Court has no jurisdiction over Japan's actions before or during the war.<sup>70</sup> In addition, the Court itself may be unwilling to adjudicate such a case. A decision by the ICJ would set an important precedent in the international community, which could prompt an inundation of similar lawsuits.<sup>71</sup>

### International Criminal Court

The statute of the newly established International Criminal Court follows the trend in current international law towards the explicit recognition of rape as an international crime.<sup>72</sup> The court will prove to be a useful body as actions can be brought before it by an individual rather than only state parties. However, according to article 11 of the Court statute a claim can only be brought based on actions after 1 July 2002, when the Statute officially came into force. As such, it will be of no use to the comfort women in seeking justice.

### Non-Governmental Initiatives – People's Tribunal

In December 2000, a peoples' tribunal organized by various women's non-governmental organisations across Asia, the Women's International War Crimes Tribunal, sat in Japan.<sup>73</sup> Prosecution teams from ten countries presented indictments: North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands showing that women in their territories were used by the Japanese Imperial Army as comfort women.<sup>74</sup>

The tribunal was to be an addendum to the inadequate trials at the end of the War which had failed to bring charges in relation to the comfort women. The Japanese government chose not to participate in the tribunal, however, in accord with international law, the tribunal engaged with Japan's arguments in its absence.<sup>75</sup>

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<sup>66</sup> Note 65.

<sup>67</sup> Note 65.

<sup>68</sup> Note 61 at Article 34.

<sup>69</sup> Note 64 at 478.

<sup>70</sup> Note 64.

<sup>71</sup> Note 64 at 479.

<sup>72</sup> *Statute of the International Criminal Court*, article 7(1)(g) 39, 41 in Bassiouni M, *International Criminal Law*, Transnational Publishers, New York, 1999 [hereinafter *Rome Statute*].

<sup>73</sup> Chinkin C, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95 *American Journal of International Law* 335 at 335.

<sup>74</sup> Note 64 at 336.

<sup>75</sup> Hijino K, 'Court Rejects 'Comfort Women' Claim: Tokyo Reparations Rejection Likely to Fuel Criticism of Government Handling of Wartime Brutality' (2000) 7 December 2000, *Financial Times* 10.



The preliminary judgment indicated that the judges had found Emperor Hirohito guilty of the charges on the basis of command responsibility, as the evidence showed that the comfort stations had been systematically instituted and operated as a matter of military policy. It found that the system constituted a crime against humanity, a breach of treaty obligations and customary international law. Indeed, the final judgment stated that Japan owed a full apology and compensation to the comfort women.<sup>76</sup> Although not legally binding, the recommendations of the people's tribunal are highly symbolic and the tribunal's judges hope that their findings will place pressure on the Japanese government to offer atonement for their actions.<sup>77</sup>

## Conclusion

Global pressure is needed to encourage the Japanese government to take full responsibility for its actions against comfort women. Though the future looks bleak for an adequate resolution in Japan, government positions can change quickly to anticipate changing international pressures.<sup>78</sup> Japan must recognize that truly "saving face" lies in seeking full reconciliation with its wartime victims.<sup>79</sup>

It is only through the full inclusion and recognition of gender issues in international law, along with the vigorous prosecution of gender crimes, that the human rights of women may be fully protected and enjoyed. With the establishment of the ICC and its potential to codify prohibitions against gender-based war crimes, the international community has made a further departure from the traditional subordination of sexual assaults in international humanitarian law.<sup>80</sup> However, "impunity continues to be one of the most prevalent causes of human rights violations" against women in the world.<sup>81</sup>

As we step into the new millennium, we must recognise that sexual slavery is not just a historical problem. Thousands of women and children are currently trapped in the web of commercial sexual exploitation that is the thriving 'sex tourism' industry. The global nature of this vexing predicament necessitates the provision of "some sort of recourse to past victims as well as protection to those who may be targets of such crimes in the future".<sup>82</sup>

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<sup>76</sup> 'Tribunal Wants Apology For Sex Slaves' 4 December 2001 online: *BBC News* at [http://news.bbc.co.uk/1/hi/english/world/asia-pacific/newsid\\_1691000/1691527.stm](http://news.bbc.co.uk/1/hi/english/world/asia-pacific/newsid_1691000/1691527.stm) (date accessed 5 December 2001).

<sup>77</sup> Note 73 at 338.

<sup>78</sup> Note 64 at 498.

<sup>79</sup> Ogawa S, 'The difficulty of apology' (2000) 22(3) *Harvard International Review* 42 at 47.

<sup>80</sup> Note 5 at 2592.

<sup>81</sup> Penrose M, 'Impunity – Inertia, Inaction and Invalidity: A Literature Review' (1999) 17 *BU International Law Journal* 269 at 270.

<sup>82</sup> Bevilacqua E, 'Child Sex Tourism & Child Prostitution in Asia: What Can Be Done To Protect The Rights Of Children Under International Law?' 5 *ILSA Journal of International & Comparative Law* 171 at 182.

# Abstracts of Papers Submitted to the Blake Dawson Waldron Student Paper Competition 2002



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WATL prides itself on being an educative forum. The Student Paper Competition is held, each year, to promote discussion and debate concerning issues of import to women and social justice.

This years finalists all submitted exceptionally topical and relevant papers. The abstracts of their papers are published below.

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## *The Politics of the Veil*

**Grace Dugan**

The veil has taken on numerous meanings in the context of nationalism, feminism, religion and post-colonialism. The politicisation of the veil and the sometimes counter-intuitive insights into male-female dynamics forms the focus of discussion. It is argued that the veil has occupied a position of significance in discourse concerning the role of women in Islamic societies. The aim of such a critique being the furtherance of understanding as to why the veil has emerged and today is considered such a potent symbol. The veiling of a woman is a surprisingly complex social practice because of the variety of ways in which it can acquire a political meaning. In conclusion it is submitted to be of the utmost importance that acknowledgment be given to the fact that all societies and cultures contain disparate viewpoints and competing visions, whilst at the same time ensuring that refuge is not sought in cultural-relativism.

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## *Black Letter Law vs. Reality and Practicality:*

*A Deconstruction of Women in the People Republic of China and their Legal System*

**Amy Lee**

The Chinese Communist Party and Marxist ideology promised to liberate women from feudalistic norms when they came to power in 1940's. This promise of equality and liberation has not been reflected in the treatment of women under the Chinese legal system. This paper examines the experiences of Chinese women, under family and property law. It considers the formal provisions of the laws, which purport to provide equality for women, and compares this to the reality of women's treatment under the law, which reflect and perpetuate traditional expectations, ideals and disempowerments. By using Heather Wishik's methodological questions to highlight the mismatch between the claims of the law and the reality of women's experiences, this paper considered the assertions and assumptions that create the mismatch and serve the interests of the dominant patriarchy. An important aspect to Wishik's series of questions include reform. The paper concludes with a critique of *Women's Rights Laws 1992* and the role of the All – China Women's Federation. The ability of these laws to promote

equality is compromised by the fact that the All China Women's Federation has strong links to the Communist Party. Although the law provides rights and remedies, the reality is that ideological and practical restrictions prevent women from asserting their rights and accessing their remedies.

*The Legal Identity of Muslim Women in Indonesian Society*

**Soloman Rowland**

What is a Muslim woman in contemporary Indonesian society? Mother, wife, daughter, believer, citizen, student, employee, employer or President? The lack of a legal identity is a gender issue facing all Muslim women in contemporary Indonesia. Muslim women assume a number of roles and are active in almost every sphere of Muslim society. However, the multi-faceted lives of Muslim women across the Indonesian archipelago only help to define "the Muslim women" in practice, not in law. Although legal definitions often shape reality or are shaped by it, they exist outside the actuality of every day life. This paper searches for a legal identity for Muslim women in the multifarious expressions of the *Syariah*, divine law, in the *Kompilasi*, the government sponsored compilation of Islamic law and from the perspective of Muslim women's groups. This paper questions the efficacy of reform, without first finding an identity for Muslim women in Indonesian society.

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